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*The European Migration Crisis and the Protection of Human Rights:
The Khlaifia case and illegal detention in the context of Article 5 of the
ECHR*

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*To my grandfather. I wish you could read this,
Thank you*

The European Migration Crisis and the Protection of Human Rights: The Khlaifia case and illegal detention in the context of Article 5 of the ECHR

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I. Introduction to Article 5 of the European Convention on Human Rights

1.1 The right to liberty and security under international law: article 5 of the Convention on Human Rights

An important first step for a research on international law is a proper legal introduction to better understand the legal cases that will be covered during this thesis. Starting from the European context in international law, the milestone that has to be taken into consideration is the Convention for the Protection of Human Rights and Fundamental Freedoms.¹ This was the first comprehensive treaty for the protection of human rights to emerge from the post-second world war law-making process.² As a matter of fact, in August 1948, the Consultative Assembly charged its Committee on Legal and Administrative Questions to consider in more detail the matter of a collective guarantee of human rights.³ In this period, the protection of individual rights attracted a great deal of attention due to the recent crush of basic rights by the atrocities of National Socialism and the consequent prove that national laws were completely inadequate.⁴ The European Convention on Human Rights was drafted in 1950 within the Council of Europe⁵, an international organization formed in the course of the first post-war attempt to unify Europe.⁶ It entered into force on the 3 September 1953 with the aim of protecting human rights and freedoms in the European area, also establishing the European Court of Human Rights.⁷ This Court founded in 1959, guarantees access to its legal means to every individual or state that feels his rights as being violated under the Convention. As a matter of fact, article 33 of the Convention establishes that any party that considers himself as a victim of the breach of one or more articles, may bring an application alleging this breach by another party that has ratified the Convention.⁸ This application has to take place only after all national means have been exhausted. The decisions of the European Court are *inter partes* meaning that they bind only the parties concerned. The convention for the protection of Human Rights and Fundamental Freedoms (the full name of the European Convention on Human Rights) provide a definition of several human rights derived from national constitutions inspired by the ideas of Enlightenment.⁹ The scope of the convention, that was identified by the contracting states, was “to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration.”¹⁰ Therefore the scope of the convention was laying down certain human rights proclaimed in 1948 by the United

¹ European Court of Human Rights, European Convention on Human Rights, 1950

² W. A. Schabas, The European Convention on Human Rights, A Commentary 2017

³ P. Van Dijk, F. Van Hoof, A. Van Rijn, L.Zwaak, Theory and Practice of the European Convention on Human Rights

⁴ Ibid.

⁵ Council of Europe, CoE, is an international organization with the aim of guaranteeing the respect of human rights, democracy and the rule of law in Europe

⁶ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, European Convention on Human Rights, 2009

⁷ European Court of Human Rights, ECHR, is a supranational Court established by the European Convention on Human Rights

⁸ Ibid. 6

⁹ Ibid.1

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14

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Nations in the Universal Declaration of Human Rights¹¹ in a binding agreement in the framework of the Council of Europe.¹² The main difference between the Universal Declaration and the European Convention is that the first present a division of human rights into civil and political, on the one hand, and economic, social and cultural rights on the other. The second, protects predominately civil and political rights because there was the immediate need for a short, non-controversial text which governments could accept at once.¹³ However, it is important to underline that rights of third and fourth generations are protected by the Convention too. These rights are of a collective fashion, they are not addressed to single individuals but to peoples and they go beyond the mere civil and social rights established by the first and second generation.

Of particular interest for this research is article 5 of the European Convention on Human Rights dealing with the right to liberty and security. The article is divided into 5 paragraphs. While the first paragraph sets out the general principle followed by an enumeration of exceptions of permissible deprivation of liberty from sub-paragraph a) to sub-paragraph f), paragraphs 2,3 and 4 are mainly procedural in nature in that they specify the requirements in terms of arrest and detention and the modalities for verification and contestation of their lawfulness. Finally, paragraph 5 provides a right for compensation in the event of the breach of article 5.

1.2 Article 5(1)(A) to (F): the grounds for detention

In particular, Article 5(1), refers to all people as human beings that as such, enjoy the rights of liberty and security intended as physical rights, aiming to ensure that no one should be deprived of that liberty in arbitrary fashion. The notion of liberty in this article covers the physical liberty which the Court identifies alongside articles 2,3, and 4 as ‘in the first rank of the fundamental rights that protect the physical security of an individual’.¹⁴ The notion of ‘lawfulness’ is fundamental to article 5: the first portion of the article sets out the conditions for which any deprivation of liberty should be “in accordance with a procedure prescribed by law”.¹⁵ As a matter of fact, each of the sub-paragraphs of art 5(1) employs the word ‘lawful’. In the text of the Convention the use of words such as ‘lawful’ and ‘lawfulness’ refers to national law, setting out an obligation to conform to the substantial and procedural rules of domestic law.¹⁶ In positive law, protection against arbitrary detention can be traced back at the clause 39 of the Magna Carta: “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standings in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment

¹¹ Universal Declaration of Human Rights, UDHR, 1948

¹² P. Van Dijk, F. Van Hoof, A. Van Rijn, L.Zwaak, Theory and Practice of the European Convention on Human Rights.

¹³ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, European Convention on Human Rights, 2009

¹⁴ Ibid.

¹⁵ Council of Europe/European Court of Human Rights,,Guide on Article 5 of the Convention, 2014

¹⁶ *Medvedyev and Others v. France* [GC], no.3394/03, §79, ECHR 2010; *Bolzano v. France*, 18 December 1986, §54, Series A no.111; *Ilascu and Others v. Moldova and Russia* [GC], no.48787/99,§461, ECHR 2004-VII; *Assandize v. Georgia* [GC], no.71503/01,§171, ECHR 2004-II; *McKay v. the United Kingdom* [GC], no.543/03, §30, ECHR 2006-X.

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of his equals or by the law of the land”.¹⁷ Moreover, protection against arbitrary detention was ensured by the ‘great writ’ of *habeas corpus*, during the time of the English Revolution¹⁸ and confirmed by article 7 of the French *Déclaration des droits de l’homme et du citoyen* and in the Constitution of the United States.¹⁹ As for today, article 5 of the European Convention is derived from article 3 (“Everyone has the right to life, liberty and security of person”) and article 9 (“No one shall be subjected to arbitrary arrest, detention or exile”) of the Universal Declaration of Human Rights.²⁰ However, it is not sufficient for a state to comply with national law in order to respect the purpose of article 5; article 5(1) requires in addition that any deprivation of liberty should be in line with the purpose of protecting the individual from arbitrariness. For this reason, an important role is given to legal certainty that has to be satisfied.²¹ This means that “the law governing conditions for the deprivation of liberty must be accessible, clearly defined, and that its application be foreseeable.”²²

Another important purpose behind article 5 is the protection of the individual from arbitrariness. The notion of ‘arbitrariness’ extends beyond the lack of conformity with the national law. As a consequence, “a deprivation of liberty that is lawful under domestic law, can still be arbitrary and thus contrary to the Convention.”²³ In this context, “a detention will be considered ‘arbitrary’ where there is an element of bad faith or deception by the authorities, even if national law was observed in technical sense.”²⁴ Moreover, the order of detention and its execution must be in line with the sub-paragraphs of article 5(1).²⁵ It is important to underline that a period of detention is in principle ‘lawful’ within the meaning of the article if it is based on a court order.²⁶ The presence of some defects in the detention order do not necessarily lead to its unlawfulness, since not every defect is of a nature that it deprives the detention of its legal basis under domestic law. Whereas, of important relevance is whether the meaning of the court’s order may be considered to have been clear to the applicant and whether the domestic court acted in bad faith or failed to apply domestic law correctly.²⁷

What legally defines a Court is his role as a body having the feature of being independent from the executive and from other parties involved into the case. In addition, the body under exam, has to enjoy the

¹⁷ Magna Carta, 1225, 9 Hen. 3, c.30, art.39.

¹⁸ *Ex Parte Yerger*, 75 US (8 Wall) 85, 95 (1869)

¹⁹ United States Constitution, 1787

²⁰ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, European Convention on Human Rights, 2009

²¹ *Mooren v. Germany* [GC], no.11364/03, §76, 9 July 2009; *Baranowski v. Poland*, no.28358/95, §§51-52, ECHR 2000-III; *Jecius v. Lithuania*, no.34578/97, §125, ECHR 2000-IX;

²² *Crenga v. Romania* [GC], no.29226/03, §120, 23 February 2012, *Medvedyev and Others v. France* [GC], no.3394/03, §80, ECHR 2010

²³ *Mooren v. Germany* [GC], no.11364/03, §77, 9 July 2009; *Saadi v. the United Kingdom* [GC], no.13229/03, §§67-68, ECHR 2008; *Crenga v. Romania* [GC], no.29226/03, §84, 23 February 2012; *A. and Others v. the United Kingdom* [GC], no.3455/05, §164, ECHR

²⁴ *Saadi v. the United Kingdom* [GC], no.13229/03, §69, ECHR 2008; *Bozano v. France*, 18 December 1986, Series A no.111; *Conka v. Belgium*, no. 51564/99, ECHR 2002-I

²⁵ *Saadi v. the United Kingdom* [GC], no.13229/03, §69, ECHR 2008; *Winterwerp v. the Netherlands*, 24 October 1979, §39, Series A no.33; *Bouamar v. Belgium*, 29 February 1988, §50, Series A no. 129; *O’Hare v. the United Kingdom*, no.37555/97, §34 ECHR 2001-X

²⁶ *Ibid.*

²⁷ P. Van Dijk, F. Van Hoof, A. Van Rijn, L.Zwaak, Theory and Practice of the European Convention on Human Rights

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judicial capacity being able to legislate on the lawfulness of the detention and in case, order release if the detention is to be found unlawful. A court has the role to verify that an actual conviction exists, that means the finding of a guilt and the imposition of a penalty involving the deprivation of liberty, following the guidelines of article 5.²⁸

For the assessment by the Court whether someone was deprived of his liberty, the first step to take into account is the concrete situation of each case under exam and a whole range of criteria such as duration, type, effects and manner of implementation of the measure in question. Indeed, the requirements that the Court has to take into account are the ‘type’ and ‘manner of implementation’ of the measure under scrutiny. Those gives the opportunity to the legislative body to have regard to the specific context and circumstances surrounding types of restrictions rather than paradigm of confinement in a cell.²⁹ In addition, the Court stated that “loss of freedom under article 5(1) contains both an ‘objective element’ such as the ‘confinement in a particular restricted space for a not eligible length of time’ and an additional ‘subjective element’ such as that a detainee must not have validly consented to the confinement in question.”³⁰ On one hand, for what concerns the objectivity, the focus is on a person’s “confinement in space and time including the possibility to leave the restricted area, the degree of supervision and control over the person’s movements, the extent of isolation and the availability of social contacts.”³¹ Moreover, if facts show a deprivation of liberty under article 5 of the Convention, “the short time of the confinement, the fact that the person has not been handcuffed, put in a cell or physically restrained, have no effect on the final decision of the court.”³² On the other hand, the subjectivity derives from the lack of valid consent of the person to the confinement in question. In addition, the impossibility of the victim to have access to legal means does not lead to the identification of his inability to understand and consent a situation. Finally, the court established that “the unacknowledged detention of an individual is a complete negation of rights under article 5.”³³

The procedure that the Court will undertake in order to assess the case, has to comply with national or international law where appropriate, and also domestic law in itself has to be in conformity with the Convention, including the principles expressed or implied in it. Those principles implied are the rule of law, legal certainty, proportionality and the principle of protection against arbitrariness. Indeed, “the practice of keeping a person in detention under a bill of indictment without any specific basis in the national legislation is in breach of article 5.”³⁴ Moreover, a period of detention is lawful only if it is finds bases on a Court order with a ‘procedure prescribed by law’. Since the article presumes that the person arrested or detained must have

²⁸ P. Van Dijk, F. Van Hoof, A. Van Rijn, L.Zwaak, Theory and Practice of the European Convention on Human Rights

²⁹ Council of Europe/European Court of Human Rights,,Guide on Article 5 of the Convention, 2014

³⁰ Ibid

³¹ Ibid.

³² Council of Europe/European Court of Human Rights,,Guide on Article 5 of the Convention, 2014

³³ El Masri v “The Former Yugoslav Republic of Macedonia”, no. 39630/09, [GC], 13 December 2012

³⁴ Baranowski v. Poland, no. 28358/95, 28/03/2000; Council of Europe/European Court of Human Rights,,Guide on Article 5 of the Convention, 2014

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had the opportunity to comply with a court order but failed to do so, the convention analyze the matter of non-compliance. Individuals have to not to be held accountable for not complying with a court order if they have never been informed of that order. “Detention under article 5 entails the failure of an individual to fulfill of an obligation, specific and concrete in nature, prescribed by law; as soon as the obligation has been fulfilled, the lawfulness of the detention ceases to exist under the convention.”³⁵ Under article 5 of the convention, “a person can be detained in the context of legal proceedings, exclusively for the purpose of bringing him before the competent legal authority on suspicious of him having committed an offence.”³⁶

The may duty of the State under article 5(1) is to refrain from actions that can lead to the infringement of the right to liberty and security, to take measures to protect vulnerable individuals and act in order to put an end to a person’s loss of liberty. As a matter of fact, the Court stated that “the first sentence of Article 5(1) lays down a positive obligation on the state to protect the liberty of its citizens.”³⁷ Such a conclusion reflects “the importance of personal liberty in a democratic society” and plugs what would otherwise be a “sizeable gap in the protection from arbitrary detention.”³⁸ For this reason, the role of the state is that of providing effective protection of vulnerable persons preventing the deprivation of liberty of which the authorities have or ought to have acknowledged. This means that, a breach of liberty by a non-State actor may be imputed to a State for its failure to act in preventing this violation.³⁹

Aside from formal arrest and detention within a criminal law setting, “article 5 has been applied to the placement of a person in institutions for psychiatric care and social services⁴⁰, international zones in airports⁴¹, interrogation in police stations⁴², house arrest⁴³, confinement in an ‘open prison’⁴⁴, and crowd control efforts.”⁴⁵ However, it is essential to underline that measures being adopted within the context of a prison that have an effect on conditions of detention do not fall within the scope of article 5(1).⁴⁶ Such measures

³⁵ Guide on Article 5 of the Convention, 2014

³⁶ Ibid.

³⁷ Ibid.

³⁸ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, European Convention on Human Rights, 2009

³⁹ Ibid ; El Masri v “The Former Yugoslav Republic of Macedonia”, no. 39630/09, [GC], 13 December 2012

⁴⁰ *De Wilde, Ooms, and Versyp v. Belgium*, 18 June 1971, Series A no. 12; *Nielsen v. Denmark*, 28 November 1988, Series A no. 144; *H.M. v Switzerland*, no.39187/98,48, ECHR 2002-I; *H.L. v. United Kingdom*, no.45508/99, ECHR 2004-IX; *Storck v. Germany*, no.61603/00, ECHR 2005-V; *A. and Others v. Bulgaria*, no.51776/08, 29 November 2011

⁴¹ *Armur v. France*, 25 June 1996, *Reports of Judgements and Decisions* 1996-III; *Shamsa v. Poland*, nos 45355/99 and 45357/99, 27 November 2003; *Morgos v. Romania*, no.20420/02, 13 October 2005; *Mahdid and Harrar v. Austria* (dec.), no.74762/01, 8 December 2005; *Riad and Idiab v. Belgium*, nos 29787/03 and 29810/03, 24 January 2008

⁴² *II v. Bulgaria*, no. 44082/98, 9 June 2005; *Osyenko v. Ukraine*, no. 4634/04, 9 November 2010; *Salayev v. Azerbaijan*, no.40900/05, 9 November 2010; *Farhad Aliyev v. Azerbaijan*, no.37138/06, 9 November 2010; *Crenga v. Romania* [GC], no.29226/03, 23 February 2012

⁴³ *Mancini v. Italy*, no.44955/98, 30 September 2004; *Lavents v. Latvia*, no.58442/00, 28 November 2002; *Nikolova v. Bulgaria* (no.2), no.40896/98, 30 September 2004; *Dacosta Silva v. Spain*, no. 69966/01, ECHR 2006-XIII

⁴⁴ *Foka v. Turkey*, no.28940/95, §78, 24 June 2008, *Gillan and Quinton v. the United Kingdom*, no.4158/05, §57, ECHR 2010 (extracts); *Shimovolos v. Russia*, no.30194/09, §50, 21 June 2011; *Berga and Others v. Moldova*, no.52100/08, §43, 20 April 2010.

⁴⁵ *Austin and Others v. the United Kingdom* [GC], nos 39692/09, 40713/09, and 41008/09, ECHR 2011; *Council of Europe/European Court of Human Rights,,Guide on Article 5 of the Convention, 2014*

⁴⁶ Council of Europe/European Court of Human Rights,,Guide on Article 5 of the Convention, 2014

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are to be considered as “modifications of the conditions of lawful detention and fall outside the scope of the article.”⁴⁷

It should be noted that article 5 of the convention envisions also an exhaustive enumeration of cases in which deprivation of liberty is to be considered lawful. These exceptions are to be found in sub-paragraphs from a) to f) of article 5(1) in which there is the recognition that the right to liberty is not absolute. As a matter of fact, these sub-paragraphs contain a list of circumstances in which the state may detain an individual in the public interest.⁴⁸ The wording of each sub-paragraph supposes that any detention is ‘lawful’. This requirement of ‘lawfulness’ entails that any detention must satisfy standards which can be summarized as follows:

- “i) The detention has a basis in, and it is in conformity with the applicable domestic law; and
- ii) The application of that domestic law is in conformity with the Convention; the detention must properly be for one of the grounds covered by Article 5(1)(a)-(f), such that it is not ‘arbitrary’.”⁴⁹

Moreover, it should be noted that exceptions listed in Article 5 do not exclude each other mutually.⁵⁰ First of all, the exception under a) concerns the lawful detention of a person after conviction by a competent court. The purpose of the sentence must therefore be the execution of the sentence of imprisonment imposed by a court judgment. The detention “has to follow the conviction basing on a causative link, in a chronological sense and it has to be a consequence of the conviction.”⁵¹ It applies starting from the moment of conviction at trial, given that the culpability of the person has already been determined.⁵² However, with the passing of time in course of the detention, “the link with the conviction itself may become exponentially remote from the objective of the legislature of the court.”⁵³ It seems evident that, for an individual already serving a sentence, there must be a sufficient causal connection between the purpose of the original detention and the reason subsequently given by a body with responsibility for assessing whether the individual should be released.⁵⁴ Moreover, detention cannot be rendered retroactively ‘unlawful’ for the purpose of Article 5(1)(a) because the conviction or sentence upon which it is based is overturned by a higher municipal court on appeal. In understanding this first sub-paragraph of Article 5, it is necessary to start by analyzing the meaning of some important words that determine the significance of the whole. Firstly, the word ‘conviction’ has an autonomous

⁴⁷ Ibid.

⁴⁸ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, European Convention on Human Rights, 2009

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Van Droogenbroeck v. Belgium, 24 June 1982, §35, Series A no.50; Weeks v. the United Kingdom, 2 March 1987, §42, Series A no.114; M. v. Germany, no.19359/04, §§87-88, ECHR 2009; Kafkaris v. Cyprus [GC], no.21906/04, §117, ECHR 2008; Stafford v. the United Kingdom [GC], no.46295/99, §64, ECHR 2002-IV; Monnel and Morris v. the United Kingdom, 2 March 1987, §40, Series A no.115; S. v. Germany, no.3300/10, §90, 28 June 2012; Dörr v. Germany (dec.), no.2894/08, 22 January 2013.

⁵² Wemhoff v. Germany, 27 June 1968, §9, Series A no.7.

⁵³ William A. Schabas, The European Convention on Human Rights, A Commentary 2017

⁵⁴ Ibid.

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meaning covering a ‘finding of guilt’ in respect of an offence that has been found to have been committed. A ‘conviction’ is a conviction by a trial court, so detention pending appeal is justified by reference to Article 5(1)(a). A ‘conviction’ exists to justify any detention based upon it, even though the judgment has not been delivered yet.⁵⁵

A. Article 5(1)(A): conviction followed by detention by a competent court

Article 5(1)(a) applies to ‘convictions’ for disciplinary and criminal offenses under municipal law provided that the outcome of the proceeding is the convicted person detention.⁵⁶ Moreover, the word ‘court’ in the context of article 5, implies that the conviction must be imposed by a judicial organ identified as “independent from the executive and from the parties to the case.”⁵⁷ This has not necessarily to be “a court of law of the classic kind integrated within the standard judicial machinery of the country”⁵⁸ but has to exhibit common fundamental features and the guarantees of judicial procedure. This means that “the court should have the competence to order release should the detention be unlawful.”⁵⁹ The question of whether a court is competent has to be found in national law. For the deprivation to be considered lawful it must have “been pronounced on the basis of a fair and public hearing in the sense of article 6 of the Convention, concerning the right to a fair trial.”⁶⁰ In case where compulsory residence was ordered not for a specific offence but because of a ‘propensity to crime’, the Court held that this did not fit within the terms of article 5(1). As a matter of fact, the Court specified that “for there to be a ‘conviction’, there must be an offence.”⁶¹ In addition, article 5(1)(a) does not prevent States from enforcing detention orders imposed by foreign courts,⁶² without them being required to verify that the proceedings in the trial respected all the requirements of article 6 of the Convention.⁶³ However, “detention resulting from a conviction by a foreign court that constituted a ‘flagrant denial of justice’ cannot be compatible with article 5(1)(a).”⁶⁴

Finally, the court has indicated that it is prepared to accept a flexible approach to the notion of causal connection when a conviction has expired and a legal process to obtain prolongation of detention on security grounds is underway, notably when “the individual concerned displays deviating tendencies and there is a threat that he will commit other criminal offences.”⁶⁵

⁵⁵ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, European Convention on Human Rights, 2009

⁵⁶ *Engel v. Netherlands* A 22 (1976); 1 EHRR 706 para 68 PC

⁵⁷ P. Van Dijk, F. Van Hoof, A. Van Rijn, L.Zwaak, Theory and Practice of the European Convention on Human Rights

⁵⁸ *X v. the United Kingdom*, 5 November 1981, §53, Series A no.46.

⁵⁹ Articles 2(1), 5(1)(a), 5(1)(b), 5(4), 6(1), 6(3).

⁶⁰ *Ibid.* 49

⁶¹ *Ibid.*

⁶² *X. v Federal Republic of Germany*, no.1322/62, Commission decision of 14 December 1963, Collection 13,p.55

⁶³ *Ibid.* 49

⁶⁴ *Stoichkov v. Bulgaria*, no.9808/02, §51,24 March 2005; *Ilascu and Others v. Moldova and Russia* [GC], no.48787/99, §461, ECHR 2004-VII

⁶⁵ *Eriksen v Norway* 1997-III; 29 EHRR 328. Note, however the concurring opinion of the judge Repik against the applicability of Article 5(1)(a)

B. Article 5(1)(B): detention after non-compliance with a court order or legal obligation

Sub-paragraph 5(1)(b) determines “*the lawfulness of detention consequent to a non-compliance with a court order or fulfillment of any legal obligation.*”⁶⁶ This provision does not apply to the ordinary enforcement of the law after breaches have occurred⁶⁷ but it applies to detention resulting from a court order or from a legal obligation. The first part of Article 5(1)(b) authorizes the detention of a person who has failed to comply with a court order already filed against him. In the light of the above, some examples include “failure to obey an order to pay a fine⁶⁸, refusal to submit to a psychiatric examination⁶⁹ or to take a blood test⁷⁰, failure to respect residence restrictions⁷¹, failure to return children to the custodial parent⁷², failure to agree to make an undertaking not to breach the peace⁷³, breach of bail conditions⁷⁴, and confinement into a psychiatric hospital.”⁷⁵ In all of these cases, the individual must have had the opportunity to comply with the court order but have failed to do so, or defied it.

The individual also cannot be detained if he or she has not been informed of the order.⁷⁶ The second part of Article 5(1)(b) provides a mean of justifying various powers of temporary detention exercisable by the police such as random breath tests, road blocks, powers of stopping and searching, to enforce obligations in connection with the administration of the criminal law. Some examples are “an obligation to do military, or substantive civilian service⁷⁷, to carry an identity card and submit to an identity check⁷⁸, to make a customs or tax return⁷⁹ or to live in a designated locality.”⁸⁰ The Court pronounced itself to have “consistently rejected a broad interpretation by which article 5(1)(b) is invoked to justify internment or administrative detention for the purpose of compelling a person to comply with general obligations arising from the law.”⁸¹ The arrest and detention must be truly decisive for the purpose of fulfillment of the obligation.⁸² The detention will only be

⁶⁶ Council of Europe/European Court of Human Rights, *Guide on Article 5 of the Convention*, 2014

⁶⁷ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, *European Convention on Human Rights*, 2009

⁶⁸ *Airey v. Ireland*, no.6289/73, Commission decision of 7 July 1977; *Velinov v. the former Yugoslav Republic of Macedonia*, no.16880/08, §§48-57, 19 September 2013

⁶⁹ *Petukhova v. Russia*, no.28796/07, §§46-64, 2 May 2013; *Nowicka v. Poland*, no.30218/96, §62, 3 December 2002; *X v. Federal Republic of Germany*, no.6859/74, Commission decision of 10 December 1975.

⁷⁰ *X. v. Austria*, no.8278/78, Commission decision of 13 December 1979

⁷¹ *Freda v. Italy*, no. 8916/80, Commission decision of 7 October 1980, (1981) 24 YB 354

⁷² *Paradis v. Germany* (dec.), no.4065/04, 4 September 2007

⁷³ *Steel and Others v. the United Kingdom*, 23 September 1998, Reports of Judgments and Decisions 1998-VII.

⁷⁴ *Gatt v. Malta*, no.28221/08, ECHR 2010.

⁷⁵ *Biere v. Latvia*, no.30954/05, 29 November 2011.

⁷⁶ William A. Schabas, *The European Convention on Human Rights, A Commentary* 2017

⁷⁷ Johansen, *ibid.* Any work or service listed in Article 4(3) of the Convention that is required of a person presumably qualifies.

⁷⁸ *Reyntjens v France* No 16810/90(1992) unreported and *B v France* No 10179/82, 52 DR 111 (1987).

⁷⁹ See McVeigh, above n 194, para 185.

⁸⁰ *Ciulla v Italy* A 148(1989); 13 EHRR 346 para 36 PC; *Ibid.* 76

⁸¹ *Ibid.* 67

⁸² *Ibid.* 76

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acceptable if it “cannot be fulfilled by milder means”.⁸³ Clearly, its character has not punitive nature and having instead the aim to provide for the fulfillment of the obligation that has to be itself compatible with the Convention. Once the obligation is fulfilled by the person concerned, the justification for his/her detention desists.⁸⁴

Moreover, Article 5(1)(b) extends not only to cases in which there has been a prior failure to comply with an obligation, but also to cases in which short-term detention is considered “necessary to make the execution of an obligation effective at the time that it arises.”⁸⁵ The test to be applied was clarified by the Commission as follows:

“In considering whether such circumstances exist, account must be taken... of the nature of the obligation. It is necessary to consider whether its fulfillment is a matter of immediate necessity and whether the circumstances are such that no other means of securing fulfillment is reasonably practicable.”⁸⁶

It is important to underline however, that this second exception mentioned under (b) such as the deprivation of liberty in order to secure fulfillment of an obligation prescribed by law, is not completely clear. Indeed, this formulation may cause great deprivations of liberty lacking any proper judicial intervention, simply by the invocation of a legal norm.⁸⁷ On one side, it is true that in those cases the fourth paragraph allows appeal to a court, but on the other side, it does not solve the problem that such a wide interpretation of this sub-paragraph would corrode many of the guarantees contained in other parts of Article 5.⁸⁸ A balance in a democratic society must be drawn between the importance of securing the immediate fulfillment of the obligation in question and the importance of the right to liberty. Some factors to draw such a balance are: the duration of the detention, the nature of the obligation arising from the relevant legislation, the person being detained and the particular circumstances leading to detention.⁸⁹

It follows from what has been stated, that Article 5(1)(b) does not justify preventive detention of the sort that a State should introduce in an emergency situation, which would be clearly inconsistent with the rule of law.⁹⁰

⁸³ Khodorkovskiy v. Russia, no.5829/04, §94, 7 March 2013.

⁸⁴ Osypenko v. Ukraine, no.4634/04, §57, 9 November 2010; Vasileva v. Denmark, no.52792/99, §236, 25 September 2003; Sarigiannis v. Italy, no.14569/05, §34., 5 April 2011; Lolova-Karadzova v. Bulgaria, no.17835/07, §29, 27 March 2012.

⁸⁵ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, European Convention on Human Rights, 2009

⁸⁶ Cf, Vasileva v. Denmark hudoc, 2003; 40 EHRR 681 para 38 (importance of : ‘the nature of the obligation arising from the relevant legislation including its underlying object and purpose; the person being detained [eg, their age, and condition] and the particular circumstances leading to the detention; and the length of the detention’)

⁸⁷ P. Van Dijk, F. Van Hoof, A. Van Rijn, L.Zwaak, Theory and Practice of the European Convention on Human Rights

⁸⁸ Ibid.

⁸⁹ Council of Europe/European Court of Human Rights,,Guide on Article 5 of the Convention, 2014

⁹⁰ Engel v. Netherlands A 22 (1976); 1 EHRR 706 para 69 PC.

C. Article 5(1)(c): detention for criminal prosecution

The third sub-paragraph is represented by article 5(1)(c) that determines “*the lawfulness of detention or arrest of a person affected for the purpose of bringing him before the competent legal authority reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so*”.⁹¹ As a matter of fact, Article 5(1)(c) governs “the arrest or detention of suspects in the administration of criminal justice.”⁹² Detention pursuant to Article 5(1)(c) involves a proportionality requirement. In doing this, “the Court considers whether detention in custody is strictly necessary or whether presence at trial can be ensured using less stringent measures sufficient for such purpose.”⁹³ Everyone that is detained under sub-paragraph (c), shall be brought immediately before a judge and is entitled to have a trial within a reasonable time or to release pending trial.⁹⁴ Three distinct grounds recognized by the Court are set out for detention under this paragraph: where “there is a reasonable suspicion that an offence has been committed; when it is reasonably considered necessary to prevent the person committing an offence; when it is reasonably considered necessary to prevent the person fleeing after having committed an offence.”⁹⁵ In assessing the risk of flight, the Court takes into account a broad range of factors such as the person’s “character, morals, home, occupation, assets and family ties, as well as the expected length of the sentence and the weight of evidence.”⁹⁶ Some key concept to be explained in this sub-paragraph of Article 5(1)(c) are: first of all the meaning of ‘*offence*’, secondly the issue of the ‘*purpose of detention*’ permissible under the article, then the meaning of the term ‘*competent legal authority*’ and finally the question of what is ‘*reasonable suspicion*’.⁹⁷

The meaning of ‘*offence*’, in this context is to be understood as one “committed under domestic criminal law.”⁹⁸ Indeed, this term has the same meaning as ‘criminal offence’ in Article 6 of the Convention: it must be “specific and concrete”.⁹⁹ Given that this term might have an autonomous Convention meaning, it could be interpreted as setting limits to the seriousness of the offence for which a state may authorize an arrest. Article 5(1)(c), sets such limits through of ‘offence’ or the word ‘unlawful’ in order to prevent arrest in connection with minor offenses that do not justify detention.¹⁰⁰ An important interpretation of the meaning of ‘offence’ was given by the Court in the case *Brogan v UK*.¹⁰¹ The facts of this case regarded the power to

⁹¹ Council of Europe/European Court of Human Rights, Guide on Article 5 of the Convention, 2014

⁹² As to a private arrest of a suspected criminal, as permitted by municipal law, Article 5(1)(c) should be interpreted as containing a positive obligation requiring that contracting parties ensure that this is permitted under its law only within the limits set by that sub-paragraph.

⁹³ William A. Schabas, The European Convention on Human Rights, A Commentary 2017

⁹⁴ P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak, Theory and Practice of the European Convention on Human Rights

⁹⁵ *Brogan v United Kingdom* 11 EHRR 117 1988

⁹⁶ *Ibid.* 81

⁹⁷ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, European Convention on Human Rights, 2009

⁹⁸ See eg, *Ciulla v. Italy* A 148 (1989); 13 EHRR 346 para 38 PC.

⁹⁹ *Ibid.* 84

¹⁰⁰ *Ibid.* 81

¹⁰¹ *Ibid.* 95

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arrest any person “concerned in the commission, preparation or instigation of acts of terrorism”, where the definition of terrorism has to be understood as “the use of violence for political ends.”¹⁰² This was not a criminal offence in itself but the power of arrest was justified under the purpose of Article 5(1)(c).¹⁰³ Even though this Article “authorizes arrest and detention to prevent commission of an offence”, this phrase cannot be taken to allow a policy of general prevention promoted at the expenses of an individual or a category of individuals who, “present a danger on account of their continuing propensity to crime.”¹⁰⁴ This interpretation derives from the word ‘offence’ in itself and the use of the singular for the purpose of preventing arbitrary prevention of the right to liberty that each and every individual must benefit.¹⁰⁵

The second part that deserves a particular attention and clarification concerns the purpose of detention. Under Article 5(1)(c) a person “may be detained only in the context of criminal proceedings for the purpose of bringing him before the competent legal authority on suspicion of his having committed an offence.”¹⁰⁶ The fact that a person detained is not eventually charged or taken before a “competent legal authority” does not necessarily mean that the “purpose” required by the Article is not present when he is arrested. More generally, the scheme of this article make clear that Article 5(1)(c) is limited to the arrest or detention of persons for the purpose of enforcing the criminal law.¹⁰⁷ Moreover, since the article mentioned above concerns only detention in the enforcement of criminal law, it is relevant to interpret the three grounds for arrest that it permits. The scope of the first ground, that concerns the suspicion of having committed an offence, is clear whereas that of the second and third is less certain; while the second seems authorizing a general power of preventive detention, the third appears redundant since a person who is ‘fleeing after having committed an offence’ can in any event be arrested.¹⁰⁸ However, the rule of the ‘prevention of an offence’ does not justify re-detention or continued detention of a prisoner even under the suspicion that he might commit another offence when released.

Coming to the identification of what a competent legal authority is, it must be said that has been described as ‘rather vague’; the meaning can be identified as ‘a judge or other officer authorized by law to exercise judicial power’ as stated in Article 5(3).¹⁰⁹ Moreover, to be considered a ‘competent legal authority’, the institution must be able to have the power to order release.¹¹⁰

Finally, the matter of reasonable suspicion. This means that there must be “facts or information which would satisfy an objective observer that the person concerned might have committed or is about to commit an

¹⁰² *Borgan v UK*, §A, no. 145-b, 11 EHRR 117, 1988

¹⁰³ *Ibid.*

¹⁰⁴ *Guzzardi v Italy*, 6 November 1980, §102, Series A no.39; *Al Husin v. Bosnia and Herzegovina*, no.3727/08, §65, 7 February 2012.

¹⁰⁵ *Winterwerp v. the Netherlands*, 24 October 1979, §37, Series A no.33; *Guizzardi v. Italy*, 6 November 1980, §120 A no.39; *M. v. Germany*, no. 19359/04, §89, ECHR 2009.

¹⁰⁶ See *Jecius v. Lithuania* 2000-IX; 35 EHRR 400 paras 50-1

¹⁰⁷ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, *European Convention on Human Rights*, 2009

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ William A. Schabas, *The European Convention on Human Rights, A Commentary* 2017

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offence”.¹¹¹ “If a person is arrested on “reasonable suspicion” that he has committed a crime or in order to prevent him to his fleeing after having done so, the conditions established under the Convention are met only if the arrest or detentions are really aimed at bringing the accused before a competent judicial authority.”¹¹² Basically, the fact that a suspicion is held in good faith is not sufficient to justify detention. The object of the detention before charge is ‘to further a criminal investigation by confirming or discontinuing suspicions which provide the grounds for detention’.¹¹³ However, the constraints provided by this provision, are to be considered of great importance since Article 5(1)(c), does not set an absolute limit to the length of time that a person may be detained prior to being charged. As the Court stated, “‘reasonable suspicion’ supposes ‘the existence of facts or information which would satisfy an objective observer that the person concerned might have committed the offence’.”¹¹⁴ ‘What has to be regarded as reasonable depends on the circumstances’.¹¹⁵ The Court must also assess if the conduct of the detainee can constitute an offence.¹¹⁶ However the ECHR insists that “the exigence of dealing with terrorist crime cannot justify stretching the notion of ‘reasonableness’ to the point where the safeguard of Article 5(1)(c) is impaired’.”¹¹⁷ Under these circumstances, “the responding government has to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence.”¹¹⁸ The provision under letter c) does not require that the warrant of arrest itself must also originate from a judicial authority. The mere fact that a person detained on remand is later released under a judicial decision does not render the arrest unlawful with retroactive effect.

D. Article 5(1)(d): detention of minors

The fourth sub-paragraph is Article 5(1)(d) concerning the detention of minors. This paragraph permits “the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority”.¹¹⁹ The *travaux préparatoires* underlined that “this wording was intended to cover the situation where a minor is detained with a view to being brought before a court not on a criminal charge but ‘to secure his removal from harmful surroundings’.”¹²⁰ The term ‘minor’ in this context and in the light of the European standards identifies all persons under eighteen years of

¹¹¹ Ibid.

¹¹² P. Van Dijk, F. Van Hoof, A. Van Rijn, L.Zwaak, Theory and Practice of the European Convention on Human Rights

¹¹³ Ibid.

¹¹⁴ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, European Convention on Human Rights, 2009

¹¹⁵ Fox, Campbell and Hartley v. UK A 182 (1990); 13 EHRR 157 para 32. There was a clear violation in Stepulec v. Moldova hudoc (2007).

¹¹⁶ Lukanov v. Bulgaria, ECtHR 20 March 1997, appl.no 21915/93, supra n.32, paras. 42-45

¹¹⁷ Ibid. the circumstances are those as they were known at the time of the arrest; Nielsen v. Denmark No. 343//57, 1 Digest 388 (1961). A confession is likely to give rise to a ‘reasonable suspicion’: AV v. Austria No. 4465/70, 38 CD 58 at 60 (1970).

¹¹⁸ O’Hara v. UK 2001-X; 34 EHRR 812 para 35.

¹¹⁹ European Court of Human Rights, European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13, 16, Article 5

¹²⁰ Ibid 111; Recueil des Travaux Préparatoires à la Convention attribuant à la Cour européenne des Droits de l’homme la compétence de donner des avis consultatifs, 1966

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age. The grounds for detention under Article 5(1)(d) require compliance with municipal law and the Convention and supposes that any deprivation of liberty is “in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness.”¹²¹ Detention for the purpose of ‘educational supervision’ “may be given a broad reading, providing the state with justification for compulsory attendance at school, which amounts to a deprivation of liberty. The words ‘educational supervision’ should not be ‘equated rigidly with notions of classroom teaching’.”¹²² The court has considered that a juvenile holding facility, where adolescents were temporarily detained for various reasons including criminal prosecution, did not amount to ‘educational supervision’ and that therefore sub-paragraph (d) was inapplicable.¹²³ But the words ‘for the purpose of’ indicate that “confinement of a juvenile in a remand prison does not necessarily breach sub-paragraph (d), even if it is not specifically directed at the ‘educational supervision’ to the extent that it is a means of ensuring that the minor is placed under ‘educational supervision’.”¹²⁴ Moreover, detention for educational supervision pursuant to Article 5(1)(d) must take place in an “appropriate facility with the resources to meet the necessary educational requirements.”¹²⁵ In addition, “when the applicant to the case has passed the school leaving age, but is still a minor, detention ‘for the purpose of educational supervision’ may still fall within the scope of Article 5(1)(d).”¹²⁶ Finally, since for this Article is very important the age for which every person attains the majority, it has to be specified that this age has to be determined by domestic law. Domestic law also establishes at what age a person can institute proceedings himself, so as the minor that has the right in the Strasbourg proceedings may be dependent on his parents or guardians for the exhaustion of the local remedies.¹²⁷

E. Article 5(1)(e): detention for medical or social reasons

Coming to Article 5(1)(e), it allows “the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind,¹²⁸ alcoholics or drug addicts or vagrants.”¹²⁹ This means that medical and social reasons justify the restriction on liberty of the individuals, including their detention. The categories of persons covered by this sub-paragraph may all be deprived of liberty “either in order to be given medical treatment or because of considerations dictated by social policy”, or both combined, the ‘predominant reason’ for allowing detention being that the person concerned “are dangerous for public safety

¹²¹ Bouamar v. Belgium A 129 (1988); 11 EHRR 1 para 47.

¹²² Ichin and Others v. Ukraine, nos 28189/04 and 28192/04, §39, 21 December 2010; William A. Schabas, The European Convention on Human Rights, A Commentary 2017

¹²³ Ibid.

¹²⁴ William A. Schabas, The European Convention on Human Rights, A Commentary 2017

¹²⁵ P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak, Theory and Practice of the European Convention on Human Rights

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ As to the relationship between Article 5(1)(a) and (e) when a person is detained by a court as mentally disordered following his conviction.

¹²⁹ European Court of Human Rights, European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13, 16, Article 5

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but also that their own interests may necessitate their detention.”¹³⁰ Since the Convention does not have in itself a definition for the terms ‘infectious diseases’, ‘person of unsound mind’, ‘alcoholics’, ‘drug addicts’ and ‘vagrants’, the national authorities will have the discretion of identify these concepts. However, in reviewing these national decisions, the Court “is prepared to carry out an independent examination of the question of whether the deprivation of liberty is in conformity with the Convention.”¹³¹

Dealing with the detention for avoiding the spreading of ‘infectious diseases’, the Court specified that it has to be considered lawful under the scope of Article 5(1)(e) “if the spreading of the disease is aimed to be dangerous for the public health or safety and whether the detention of the person to prevent this spread is to be found as last resort after other measures have been proved insufficient to safeguard the public interest.”¹³²

Considering the meaning of ‘persons of unsound mind’, the Court established “the inexistence of a ‘definitive interpretation’ because the medical profession’s understanding of mental disorder is still developing’.”¹³³ However, is evident that a person cannot be detained under Article 5(1)(e) “simply because his views or behavior deviate from the norms prevailing in a particular society.”¹³⁴ In the application of this provision, the Court applies what are identified as ‘Winterp Criteria’, after the case¹³⁵ in which they were set out: “the person has to be reliably shown to be of unsound mind; the mental disorder must be of a kind or degree warranting confinement without consent; and the continued validity of detention depends upon the persistence of the disorder.”¹³⁶ When determining if a person is to be considered of unsound mind, there must be reference to municipal laws, which will define or list the categories of mental disorders and its application case in the light of current psychiatric knowledge.¹³⁷ After this first passage, the authorities will have to comply with domestic law in order for a detention to be lawful. In addition, is important to specify that “the evaluation of whether the medical evidence indicates recovery may need some time,¹³⁸ but continued deprivation of liberty for pure administrative reasons is not justified.”¹³⁹ The place where this “detention must be operated are hospitals, clinics, or other suitable institutions authorized for this purpose.”¹⁴⁰

Coming to the definition of ‘alcoholic’, the Court clarified that “the person under scrutiny need not to be in a clinical state of alcoholism.”¹⁴¹ The provision has been viewed broadly as “permitting detention of individuals in order to prevent alcohol abuse and to prevent dangerous conduct by persons following the consumption of drink.”¹⁴² In this way, Article 5(1)(e) can be employed “to facilitate the detention of

¹³⁰ *Enhorn v. Sweden* 2005-I; 41 EHRR 633 para 43. See also *Guzzardi v. Italy* A 39 (1980); 3 EHRR 333 para 98 PC and *Witold Litwa v Poland* 2000-III 289; 33 EHRR 1267 para 60.

¹³¹ P. Van Dijk, F. Van Hoof, A. Van Rijn, L.Zwaak, *Theory and Practice of the European Convention on Human Rights*

¹³² See 110

¹³³ *Winterwerp v. Netherlands* A 33 (1979); 2 EHRR 387 para 40

¹³⁴ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, *European Convention on Human Rights*, 2009

¹³⁵ P. Van Dijk, F. Van Hoof, A. Van Rijn, L.Zwaak, *Theory and Practice of the European Convention on Human Rights*

¹³⁶ *Ibid.* 113; *Witold Litwa v. Poland*, no. 26629/95, §60, ECHR 2000-III.

¹³⁷ *Ibid.* 113

¹³⁸ *Luberti v. Italy*, 23 February 1984, §28, series A no. 75

¹³⁹ *R.L and M.J.-D. v. France*, no. 44568/98, §129, 19 May 2004.

¹⁴⁰ *Ashingdane v. the United Kingdom*, 28 May 1985, §44, Series no. 93; *O.H. v. Germany*, no. 4646/08, §79, 24 November 2011.

¹⁴¹ *Witold Litwa v. Poland*, no. 26629/95, §51, ECHR 2000-III.

¹⁴² *Ibid.*

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intoxicated individuals just referred to for temporary (sobering up) periods either when the misdemeanor is not actually a criminal offence or, if so, when, for whatever reason, there is no real intention of progressing them through the criminal justice system.”¹⁴³ However, this does not mean that Article 5(1)(e) permits the detention of an individual merely because of high alcohol intake.¹⁴⁴ The same criteria established for ‘alcoholics’ will also apply to ‘drug addicts’.

Finally, the last category contemplated under Article 5(1)(e) is ‘vagrants’. The Vagrancy case¹⁴⁵ happened under Belgian law in which the term ‘vagrant’ was identified as “persons who have no fixed abode, no means of subsistence and no regular trade or profession.”¹⁴⁶ Although the Court did not expressly state that the Convention meaning was co-terminous with that in Belgian law, it is likely that the latter reflects the general understanding of the term.¹⁴⁷ In addition the Court held that “national courts could deduce from the information available that the person concerned met the criteria.”¹⁴⁸ However, a guarantee has been created against too wide national interpretations and applications with a restrictive interpretation: “it may not be inferred from the exception of Article 5(1)(e) that the detention of a person who may constitute a greater danger than the categories mentioned in that article, is permitted equally and a *fortiori*.”¹⁴⁹

F. Article 5(1)(f): detention to prevent entry or for expulsion and deportation

The last sub-paragraph of Article 5(1) is letter (f). This permit “the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”¹⁵⁰ It is important to highlight that the Convention allows States to control the liberty of aliens in an immigration context.¹⁵¹ States parties of the Convention have an “undeniable sovereign right to control aliens entry into and residence in their territory.”¹⁵² This means that “States may detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not.”¹⁵³ The Court has spoken of two limbs of Article 5(1)(f): the first concerns prevention of unauthorized entry and the second deals with the removal of persons already on the territory. The concept that defines detention as not be arbitrary in his fashion applies to the first part of Article 5(1) under (f) in the same manner

¹⁴³ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, European Convention on Human Rights, 2009; Cf the requirements of Article 5(1)(c)

¹⁴⁴ Council of Europe/European Court of Human Rights, Guide on Article 5 of the Convention, 2014

¹⁴⁵ De Wilde, Ooms and Versyp v. Belgium, A 12 (1971); 1 EHRR 373 PC.

¹⁴⁶ Ibid.

¹⁴⁷ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, European Convention on Human Rights, 2009; Cf the requirements of Article 5(1)(c)

¹⁴⁸ P. Van Dijk, F. Van Hoof, A. Van Rijn, L.Zwaak, Theory and Practice of the European Convention on Human Rights

¹⁴⁹ Ibid. 127; Guzzardi v. Italy, ECtHR, 6 November 1980, appl. no. 7367/76, supra n. 10, para. 98.

¹⁵⁰ European Court of Human Rights, European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13, 16, Article 5

¹⁵¹ Amuur v. France, 25 June 1996, §41, Reports of Judgments and Decisions 1996-III; Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, §§67-68, Series A no. 94.

¹⁵² Ibid.

¹⁵³ Saadi v. the United Kingdom [GC], no. 13229/03, §64, ECHR 2008.

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as it applies to detention under the second limb.¹⁵⁴ Unlike other sub-paragraphs of Article 5(1), in particular Article 5(1)(c), there is no requirement in Article 5(1)(f) that detention be justified by protection of crime or public safety, or out of concern for the individual being detained. It does not demand that detention has to be reasonably necessary, for example to prevent the individual from committing an offence or fleeing.¹⁵⁵ “Detention must be carried out in good faith and connected to the purpose of preventing unauthorized entry, deportation, or extradition, the place and conditions of detention should be appropriate, the length of detention should not exceed the reasonably required for the purpose being pursued.”¹⁵⁶

The Convention does not establish any circumstance to extradite an individual and it does not even prevent international cooperation between states provided that there is no interference with the Convention itself. In cases concerning expulsion, the Court sometimes requests a stay pending its determination of the merits, given the potential for irreversible harm.¹⁵⁷

1.3 Article 5(2): information on reasons for arrest

At this stage, the analysis of the Article goes on with the study of paragraph (2) that deals with ‘the information of the reasons to arrest’.¹⁵⁸ Article 5(2) recites “everyone that is arrested shall be promptly informed, in a language that he understands, of the reasons for his arrest and of any charge against him.”¹⁵⁹ This means that “the individual or his/her representative must be provided with all the information necessary.”¹⁶⁰ Important to notice is that, “neither the information need to be related in its entirety by the arresting officer at the very moment of the arrest,¹⁶¹ nor there is the need to present a full list of charges against the arrested individual.”¹⁶² During the interrogation or the questioning following the arrest, it may happen that the reasons for the person’s arrest may be provided or become apparent.¹⁶³ The person arrested “cannot claim not to have understood the reasons for arrest when it is apparent from the circumstances.”¹⁶⁴ If a failure by the national authorities to respect this requisites is underlined, the arrest and detention will be deemed

¹⁵⁴ P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak, *Theory and Practice of the European Convention on Human Rights*

¹⁵⁵ W. A. Schabas, *The European Convention on Human Rights, A Commentary 2017*; *Al Husin v. Bosnia and Herzegovina*, no.3737/08, §61, 7 February 2012.

¹⁵⁶ *Ibid.*

¹⁵⁷ W. A. Schabas, *The European Convention on Human Rights, A Commentary 2017*

¹⁵⁸ European Court of Human Rights, *European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13, 16, Article 5*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.* 154

¹⁶¹ *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, §40, Series no.182; *Murray v. the United Kingdom*, 28 October 1994, §72, Series A no. 300-A.

¹⁶² *Bordovskiy v. Russia*, no.49491/99, §56, 8 February 2005; *Soysal v. Turkey*, no. 50091/99, §68, 3 May 2007; *Nowak v. Ukraine*, no. 60846/10, §63, 31 March 2011; *Gasinis v. Latvia*, no. 69458/01, §53, 19 April 2011.

¹⁶³ *Fox, Camobell and Hartley, v. the United Kingdom*, 30 August 1990, §41, Series A no.182; *Kerr v. the United Kingdom (dec.)*, no. 40451/98, 7 December 1999; *Murray v. the United Kingdom*, 28 October 1994, §77, Series A no. 300-A.

¹⁶⁴ *Dikme v. Turkey*, no. 20869/92, §54, ECHR 2000-VIII.

unlawful, even if they can be brought under a case mentioned in paragraph 1. In order for a person to be able to decide whether there are reasons for recourse to a court, adequate information must be available to him.¹⁶⁵ Analyzing the words used in this paragraph it can be said that ‘arrested’ and ‘charge’ imply that the text belongs to a criminal law context. However, the Court stated that “Article 5(2) should be interpreted ‘autonomously’ so as to extend the notion of ‘arrest’ beyond the realm of criminal law.”¹⁶⁶

1.4 Article 5(3): accountability during pre-trial detention and trial within a reasonable time

Article 5(3) deals with the right to be promptly brought before a judge stating that “everyone that is arrested or detained in the provision of paragraph (c) of the Article has the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power.”¹⁶⁷ This provision entitles persons arrested or detained on suspicion of having committed a criminal offence to a solid safeguard against any arbitrary or unjustified deprivation of liberty.¹⁶⁸ This judicial control “serves to provide effective safeguard against the risk of ill-treatment, which is at its greatest in the early stage of detention, and against the abuse of power bestowed on law enforcement officers or other authorities for what should be narrowly restricted purposes exercisable in accordance with prescribed procedures.”¹⁶⁹ Therefore, this Article requires that ‘the judicial officer’ consider the legal criteria relating to the merits of the detention and to order the provisional release if it is unfeasible.¹⁷⁰ Moreover, it is important to specify that judicial control of the detention must be ‘automatic’¹⁷¹ because “vulnerable categories of arrested persons, such as mentally weak or those who do not speak a local language, may not bring the appropriate application of their own accord.”¹⁷² For what concerned the feature of promptness the Court stated that “it has to be assessed in each case, according to its special features, never impairing the very essence of the right guaranteed by article 5(3).”

1.5 Article 5(4): remedy to challenge the legality of detention

Paragraph (4) it is to be considered the so called ‘*Habeas Corpus*’ of Article 5.¹⁷³ As already presented at the beginning of the introductory chapter, ‘the great writ’ was present at the birth of human rights litigation

¹⁶⁵ P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak, Theory and Practice of the European Convention on Human Rights

¹⁶⁶ W. A. Schabas, The European Convention on Human Rights, A Commentary 2017

¹⁶⁷ European Court of Human Rights, European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13, 16, Article 5

¹⁶⁸ Aquilina v. Malta [GC], no. 25642/94, §47, ECHR 1999-III; Assenov and Others v. Bulgaria, 28 October 1998, §146, Reports of Judgments and Decisions 1998-III.; Ibid. 121

¹⁶⁹ Ladent v. Poland, no. 11036/03, §75, 18 March 2008.; Ibid. 121

¹⁷⁰ Ibid. 142; D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, European Convention on Human Rights, 2009; Cf the requirements of Article 5(1)(c)

¹⁷¹ De Jong, Baljet, and Van Den Brink v. Netherlands A 77 (1984); 8 EHRR 20 para 51 and Aquilina v. Malta 1999-III; 29 EHRR 185 para 49 GC.

¹⁷² Ibid. 142; McGoff v. Sweden No 9017/80, 31 DR 72 (1982); 6 EHRR CD 101 (1984)

¹⁷³ W. A. Schabas, The European Convention on Human Rights, A Commentary 2017

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in the tumultuous times of the English, French and American revolution.¹⁷⁴ By the end of the eighteenth century, *habeas corpus*, was central to the rule of law in its affirmation of “an entitlement to have detention reviewed by the courts.”¹⁷⁵ This is the only distinct remedy set out in the European Convention. Article 5(4) provides a “*lex specialis* in relation to the more general requirements of Article 13.”¹⁷⁶ It gives a detained person the right to seek judicial review of their detention.¹⁷⁷ Like paragraph 2 of Article 5, the fourth paragraph requires that “the person arrested be informed of the reasons of his arrest in order to be able to take proceedings with a view to having the lawfulness of his detention determined.”¹⁷⁸

The guarantees under the *habeas corpus* extend to all the cases of deprivation of liberty listed in Article 5(1). Moreover, has to be taken into consideration that, where a National Court, after the conviction of an individual, takes the decision of imposing a fixed sentence of imprisonment for the purpose of the punishment, the supervision required by Article 5(4) is incorporated in that court decision.¹⁷⁹ The Court contemplated by Article 5(4) must be able to assess whether there is sufficient evidence that the individual under scrutiny has actually committed an offense. This evidence is considered necessary to determine the ‘lawfulness’ of the detention.¹⁸⁰ Under paragraph 4, a person is not entitled of being heard every time he/she asks an appeal against a decision extending detention. However, he/she has the right “to be heard at regular intervals”¹⁸¹ but it is necessary to highlight the fact that Article 5(4) cannot be taken to provide a right to release on parole.”¹⁸²

Moreover, the challenge of the detention under Article 5(4) has the right to “be decided speedily”;¹⁸³ this right has to be determined in the light of each case.

1.6 Article 5(5): right to compensation for illegal detention

Finally, the fifth and last paragraph of Article 5, deals with the topic of compensation referring to everyone who has been the victim of unlawful arrest or detention.¹⁸⁴ As a matter of fact, if the arrest was deemed in contravention of the provisions of Article 5 from paragraphs (1) to (4), he/she “shall have an enforceable right to compensation.”¹⁸⁵ This right grants an independent right *vis-à-vis* the national authorities,

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Article 13 of the ECHR

¹⁷⁷ *Mooren v. Germany* [GC], no. 11364/03, §106, 9 July 2009; *Rakevich v. Russia*, no.58973/00, §43, 28 October 2003.; Ibid. 127

¹⁷⁸ *X. v. the United Kingdom*, ECtHR 5 November 1981, appl. no. 7215/75, supra n.54, para. 66.; P. Van Dijk, F. Van Hoof, A. Van Rijn, L.Zwaak, *Theory and Practice of the European Convention on Human Rights*

¹⁷⁹ Ibid.

¹⁸⁰ *Nikolova v. Bulgaria* [GC], no. 31195/96, §58, ECHR 1999-II.

¹⁸¹ *Altinok v. Turkey*, no. 31610/08, §54, 29 November 2011; *Knebl v. the Czech Republic*, no.20157/05, §85, 28 October 2010; *Catal v. Turkey*, no. 26808/08, §33, 17 April 2012.; Ibid. 129

¹⁸² *Kafkaris v. Cyprus* (dec.), no. 9644/09, §58, 21 June 2011.

¹⁸³ *Baronowski v. Poland*, no. 28358/95, §68, ECHR 2000-III; *Idalov v. Russia* [GC], no. 5826/03, §154, 22 May 2012; *R.M.D. v. Switzerland*, 26 September 1997, §42, Reports of Judgments and Decisions 1997-VI.

¹⁸⁴ European Court of Human Rights, European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13, 16, Article 5

¹⁸⁵ Council of Europe/European Court of Human Rights,,Guide on Article 5 of the Convention, 2014

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the violation of which right may constitute an object of a separate complaint.¹⁸⁶ States are free to make compensation dependent upon a demonstration by the victim that a damage has resulted from the breach of Article 5.¹⁸⁷ As the Court stated, “there can be no question of compensation if there was no pecuniary or non-pecuniary damage to compensate.”¹⁸⁸

Article 5 and novel issues reaching the Court

To conclude this in-depth analysis of Article 5 of the European Convention on Human Rights it is necessary to say that this Article remains the subject of a considerable amount of jurisprudence due to its sometimes-confusing phrasing. A large number of judgments today concern basic violations of Articles 5(3) and 5(4).¹⁸⁹ However, novel issues continue to reach the Court as is evidenced in case law concerning “private detention, asylum seekers in transit zones at airports, and detention of ‘alcoholics’ and HIV sufferers.”¹⁹⁰ Considering the jurisprudence as a whole, the wish of some of the drafting states “to have express confirmation of all the circumstances in which they might detain an individual, rather than just a general prohibition of ‘arbitrary’ detention”,¹⁹¹ has caused some predictable problems. Some countries made reservations concerning the military discipline in force in their territory. Some other states with criminal procedure systems that allow the detention of suspects upon a determination by the prosecutor, without any judicial intervention, have formulated reservations too.¹⁹² One problem is that Article 5(1)(c) and (3) are imperfectly drafted: the first has been interpreted in a way that properly reflects the criminal process and Article 5(3) incorporates a right to bail. Moreover, these two provisions are also difficult to apply uniformly to the different civil and common law systems; if the aim of the Court was that of “emphasizing substance rather than form, the result can sometimes be a rule that does not apply easily to all kind of legal systems.”¹⁹³

As a matter of fact, the focus of this research will be the analysis of the case study *Khlaifia and Others v. Italy*¹⁹⁴ concerning the breach of Article 5 of the ECoHR.

Finally, the last chapter of the thesis will have the purpose of considering and studying the challenges that the Court faces in contemporary times when it has to deal with breaches of international law, in particular with Article 5 of the Convention and the possible future developments in the jurisprudence.

¹⁸⁶ P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak, *Theory and Practice of the European Convention on Human Rights*

¹⁸⁷ *Wloch v. Poland* (no.2), no. 33475/08, §32, 10 May 2011; *Wassink v. the Netherlands*, 27 September 1990, §38, Series A no. 185-A.; W. A. Schabas, *The European Convention on Human Rights, A Commentary* 2017

¹⁸⁸ *Wassink v. Netherlands* A 185-A (1990).

¹⁸⁹ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, *European Convention on Human Rights*, 2009; Cf the requirements of Article 5(1)(c)

¹⁹⁰ *Ibid.*

¹⁹¹ Contrast Article 9(1), ICCPR, see n 145 above.

¹⁹² W. A. Schabas, *The European Convention on Human Rights, A Commentary* 2017

¹⁹³ D.J Harris, M. O’Boyle, E.P Beates, C.M Buckley, *European Convention on Human Rights*, 2009; *Huber v. Switzerland* A 188 (1990) para 43 PC.

¹⁹⁴ Final Judgment *Khlaifia and Other v. Italy*, Application no. 16483/12, Grand Chamber, Strasbourg 15 December 2016

II. Kilhaifia and Others v. Italy: A Case Study

1. The geopolitical context: the migration crisis in Europe

In this decade, Europe is facing the challenging matter of immigration described as to be “*the action by a person from a non-EU country establishes his or her usual residence in the territory of an EU country for a period that is, or it is expected to be, at least twelve months*”.¹⁹⁵ This phenomenon constitutes “one of the most dramatic and complex situations of the contemporary times representing the increasing inequalities between the “north” and the “south” of the world.”¹⁹⁶ This wave of over one million people including refugees, displaced persons and other migrants, is pushed by the terror of the war in Syria and the political instability of other northern African countries following the Arab Spring of late 2010.¹⁹⁷ As a matter of fact, the majority of migrants came from Muslim-majority countries.¹⁹⁸ The peak of the phenomenon was registered in the years 2015-2016, when the European Union experienced “an afflux of immigrants never seen before.”¹⁹⁹ Many of these people are coming to Europe searching for international political and religious protection, asylum and better living conditions. The European Union has the legal and moral duty²⁰⁰ to protect people in need while it is competence of the Member States to “examine asylum requests and chose who will receive protection.”²⁰¹ The majority of immigrants “arrive in the EU after perilous land or sea journeys and require basic humanitarian assistance, such as provision of clean water, health care, emergency shelter and legal aid.”²⁰²

For what concerns the legal perspectives behind this humanitarian crisis, article 5 of the European Convention on Human Rights has a role in “the protection against the deprivation of liberty outside formal arrest of immigrants attempting to come to a country.”²⁰³ More specifically, the question of its applicability has arisen in a variety of circumstances among which “the protection of sea-migrants against holding in reception facilities and on ships.”²⁰⁴ The most important piece of legislation regarding this topic has to be

¹⁹⁵ Glossary of the EU Immigration Portal

¹⁹⁶ F. Tuccari, La “crisi migratoria” in Europa, Zanichelli, 2015

¹⁹⁷ L’UE e la crisi migratoria, Online Publications European Commission, July 2017, Link: <http://publications.europa.eu/webpub/com/factsheets/migration-crisis/it/>

¹⁹⁸ P. Kinglsey, Refugee crisis: apart from Syrians, who is travelling to Europe?, The Guardian, 10 September 2015; J. Park, Europe’s migration crisis, Council on Foreign Relations, 23 September 2015;

¹⁹⁹ Ibid.

²⁰⁰ European Commission – Statement, European Commission Statement on developments in the Mediterranean, STATEMENT/15/4800, 19 April 2015

²⁰¹ Ibid.

²⁰² “Refugee Crisis in Europe”, European Civil Protection and Humanitarian Aid Operations- European Commission, 26 July 2016, Link: <https://ec.europa.eu/echo/refugee-crisis>

²⁰³ European Court of Human Rights, European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13, 16, Article 5

²⁰⁴ Council of Europe/European Court of Human Rights, Guide to Article 5 of the European Convention on Human Rights, December 2018 (last update)

found in the case *Khlaifia and Others v. Italy*²⁰⁵. In this case, the Grand Chamber of the European Court of Human Rights released a landmark judgment with broad implications for how States must respect the individual rights of migrants.²⁰⁶

2. The case: the facts from the arrival in Italy to the deportation

The case under exam, has his origins in an application (no. 16483/12) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms.²⁰⁷ The case refers to three Tunisians nationals, Mr Saber Ben Mohamed Ben Ali Khlaifia, Mr Fakhreddine Ben Brahim Ben Mustapha Tabal and Mr Mohamed Ben Habib Ben Jaber Sfar who left on rudimental boats with the aim of reaching Italy in September 2011 during the events of the ‘Arab Spring’.²⁰⁸ During their crossing, after several hour at sea,²⁰⁹ the Italian coastguard intercepted the boat with which they were trying to get to Italy and took them to an Early Reception and Aid Center (Centro di Soccorso e Prima Accoglienza- CSPA)²¹⁰ named ‘ Contrada Imbriacola’ along with many other Tunisian migrants that were escaping to the events of the ‘Arab Spiring’,²¹¹ on the island of Lampedusa.²¹² Here they were unlawfully detained upon arrival in Italy²¹³ in inhumane conditions: “the center was overcrowded, with unacceptable sanitation, inadequate space to sleep and no contact with the outside world due to constant police surveillance.”²¹⁴ Following a violent uprising of migrants few days after the arrival of the applicants in the CSPA, the center was partially destroyed and they were transferred to a sports park (*palazzetto dello sport*) where the applicants managed to break free from the police surveillance and take part with other 1800 immigrants in a demonstration in the village of Lampedusa.²¹⁵ They were located, arrested and transferred on two moored ships in Palermo’s harbor, where they were confined to overcrowded areas with very limited access to the toilets, without any information and eventually mistreated and insulted by police officers.²¹⁶ After 5-7 days, they were taken to Palermo’s airport, where they were received by the Tunisian Consul, who

²⁰⁵ *Khlaifia and Others v. Italy*. App. No. 16483/12, European Court of Human Rights [GC], 15 December 2016

²⁰⁶ I. Wuerth, *Intrenational Decisions*, The American Society of International Law, 2018

²⁰⁷ Final Judgment *Khlaifia and Other v. Italy*, Application no. 16483/12, Grand Chamber, Strasbourg 15 December 2016

²⁰⁸ European Database of Asylum Law, European Court of Human Rights: *Khlaifia and Others v. Italy* (no.16483/12) [Articles 3,5 and 13 ECHR, Article 4 Protocol No.4] <https://www.asylumlawdatabase.eu/en/content/european-court-human-rights-khlaifia-and-others-v-italy-no-1648312-articles-3-5-and-13-echr>

²⁰⁹ *Ibid.* 179

²¹⁰ CSPAs are more commonly known as migration ‘hotspots’, which are different from Italy’s Centers for Identification and Expulsion of Aliens (Centro di Identificazione ed Espulsione- CIE). Indeed, hotspots are generally run by the European Union (EU), and their operations are not governed by Italian law while CIEs, by contrast, are run by Italy and authorized by Italian legislation; Council of Europe/European Court of Human Rights, *Guide to Article 5 of the European Convention on Human Rights*, December 2018 (last update)

²¹¹ Council of Europe/European Court of Human Rights, *Guide to Article 5 of the European Convention on Human Rights*, December 2018 (last update)

²¹² *Ibid.* 180

²¹³ European Database of Asylum Law, ECtHR- *Khlaifia and Others v. Italy* (no. 16483/12), 1 September 2015 (retrived from <https://www.asylumlawdatabase.eu/en/content/ecthr-khlaifia-and-others-v-italy-no-1648312-1-september-2015>)

²¹⁴ *Ibid.* 184

²¹⁵ Final Judgment *Khlaifia and Other v. Italy*, Application no. 16483/12, Grand Chamber, Strasbourg 15 December 2016

²¹⁶ *Ibid.*

merely recorded their identities in accordance with the agreement between Italy and Tunisia of 2011²¹⁷, and deported to Tunisia.²¹⁸ The text of the agreement was kept secret, unavailable to either the migrants nor the public.²¹⁹ Nonetheless, “appended in an annex to their request for referral to the Grand Chamber, the Government produced extracts from the minutes of a meeting held in Tunis between the Ministries of the Interior of Tunisia and Italy.”²²⁰ According to a press release available on the website of the Italian Ministry of the Interior,²²¹ Tunisia “undertook to strengthen its border controls with the aim of avoiding fresh departures of irregular migrants, using logistical resources made available to it by the Italian authorities.”²²² Moreover, annexed to their observation, the Government produced three refusal-of-entry orders dated 27 and 29 September 2011 that had been issued respecting the applicants. As a matter of fact, these orders were virtually identical, drafted in Italian by the Chief of Police of Agrigento with a translation into Arabic and stated that “1) they found the Tunisian nationals not fully identified and undocumented near Agrigento; 2) that the alien entered the national territory by evading the border controls; and 3) the identification of the Tunisian nationals took place on/immediately after their arrival on national territory and precisely in the island of Lampedusa.”²²³ The orders issued to the Tunisian nationals “were each accompanied by a record of notification bearing the same date, also drafted in Italian with an Arabic translation.”²²⁴ “In the space reserved for the applicants’ signatures, both records contain the handwritten indication ‘[the person] refused to sign or to receive a copy’.”²²⁵ At their arrival at the Tunis airport, the applicants were finally released.²²⁶

2.1 The reference legislation at the International, Communitarian and National Level

At the international level, it is important to take into account documents regulating migration flows. An important example is the Resolution of December 2014 of the General Assembly of the United Nations²²⁷ in which it is recognized “the right of every country of expulsion of immigrants from its own national territory, in the respect of fundamental principles of international law²²⁸, of Human Rights²²⁹ and of a general principle

²¹⁷ Italian-Tunisian agreement on measures to control the flow of irregular migrants from the country, 5 April 2011

²¹⁸ European Database of Asylum Law, ECtHR- *Khlaifia and Others v. Italy* (no. 16483/12), 1 September 2015 (retrieved from <https://www.asylumlawdatabase.eu/en/content/ecthr-khlaifia-and-others-v-italy-no-1648312-1-september-2015>)

²¹⁹ I. Wuerth, *International Decisions*, The American Society of International Law, 2018

²²⁰ Final Judgment *Khlaifia and Others v. Italy*, Application no. 16483/12, Grand Chamber, Strasbourg 15 December 2016

²²¹ The press release can be consulted at:

http://www1.interno.gov.it/mininterno/export/sites/default/it/sezioni/sala_stamp/notizie/im_migrazione/000073_2011_04_06_accordo_Italia-Tunisia.html

²²² *Ibid.* 220

²²³ European Database of Asylum Law, ECtHR- *Khlaifia and Others v. Italy* (no. 16483/12), 1 September 2015 (retrieved from <https://www.asylumlawdatabase.eu/en/content/ecthr-khlaifia-and-others-v-italy-no-1648312-1-september-2015>)

²²⁴ *Ibid.* 220

²²⁵ *Ibid.* 192

²²⁶ *Ibid.* 220

²²⁷ Resolution A/RES/69/119, 10 December 2014

²²⁸ Report of the International Law Commission, A/69/10, 5 May-6 June- 7 July- 8 August 2014, Text of Draft article on the expulsion of aliens, art. 3

²²⁹ *Ibid.* art. 13

of legality²³⁰ punishing collective expulsions²³¹.” Moreover, also in international law it is prohibited to detain and practice similar forms of deprivation of liberty that “go beyond a limited period of time and that are not practiced for exigences connected with expulsion²³².”²³³

Another relevant piece of legislation at the communitarian level, is Directive 2008/115/EC of 16 December 2008 presenting “norms and procedures applicable in the Member States when repatriate citizens of foreign countries that do show a regular residence permit.”²³⁴ The Directive explains that States are free to guarantee periods of “voluntary return”, giving to immigrants the possibility to go back to their home country without specific formalities. At the end of these periods, “it is possible to proceed with expulsions²³⁵, always following the principles of rationality and proportionality²³⁶.” Concerning the topic of detention, the directive confirms in art. 15²³⁷, that detention is “a provision that should be used only as a last resort and only in the expectation of a provision of refusal to entry.”²³⁸ This practice should be carried out taking into account and respecting formal requisites provided by art. 2²³⁹ - such as “the necessity of a written and motivated provision of the authorities” – but also article 16 regarding the conditions of immigrants in the structures used for their placement.²⁴⁰ Moreover, article 18²⁴¹ establishes that “in cases in which the exceptional high number of citizens of third party countries to repatriate implies a unexpected burden for the capacity of the centers of temporary permanence of a Member State or for its administrative or judiciary personal, until the abnormal situation persists the Member State can adopt urgent measures regarding the conditions of detention.”²⁴²

From the national point of view, Italian law presents the Bossi- Fini law, d.lgs. 286/98²⁴³ that makes clear that the police commissioner (*questore*) “can dispose the removal of all individuals that entered the country in an illegal way²⁴⁴.” These illegal immigrants can be detained “in the closer center for identification and expulsion”²⁴⁵. This law, even if very strict and clear, clashes with the practical reality that prevent to perform

²³⁰ Ibid. art. 5

²³¹ Ibid. art. 9

²³² Ibid. art. 19

²³³ F. Tumminello, L'Italia e la gestione dei migranti: il caso Khlaifia c. Italia, 4 April 2019

²³⁴ Ibid.

²³⁵ In the case of expulsions by air, the Directive establishes how these expulsions should be carried out following the decision 2004/573/EC

²³⁶ Direttiva 2008/115/CE del Parlamento Europeo e del Consiglio, art. 8, 16 December 2008

²³⁷ Ibid. art 15

²³⁸ Ibid. 201

²³⁹ Ibid. 204 art. 2

²⁴⁰ Ibid. 201

²⁴¹ Codice penale e delle leggi penali, Capo IV, art 18

²⁴² Ibid. 201

²⁴³ Decreto Legislativo 25 Luglio 1998, n. 286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, Gazzetta Ufficiale n.191, Supplemento ordinario n. 139, 18 August 1998

²⁴⁴ Ibid. art. 10

²⁴⁵ Ibid. art. 13

in a fast way expulsions and repatriations, causing an overcrowding of structures aimed at the temporary accommodation of people waiting for expulsion.²⁴⁶

3. When the law steps in: from the preliminary investigation in Palermo to the ECtHR

3.1 The preliminary investigation and decision of the Palermo preliminary investigation judge

This case immediately captured the attention of some anti-racism associations and human rights groups that filed complaints that led to criminal proceedings against officials in Palermo²⁴⁷ about the treatment to which immigrants had been victims on board the ships.²⁴⁸ The Palermo preliminary investigation judge granted the public prosecutor request and in his reasoning underlined the purpose of placing the immigrants in the CSPA to accommodate, assist and cater them for their hygiene-related needs as long as was strictly necessary before sending them to an Identification and Removal Center (*Centro di Identificazione ed Espulsione- CIE*) or taking any measure in their favor.²⁴⁹ The judge, however, shared the public prosecutor view that the condition and duration of the confinement of immigrants in the CSPA was sometimes vague, and that the Agrigento police authority (*questura*) “had merely registered the presence of the migrants at the center without taking any decision ordering their confinement.”²⁵⁰ In the subsequent reasoning, the judge stated that, due to the instable situation at the CSPA after the outbreak of violence and the fire, a “state of necessity” (*stato di necessità*) was issued, following Article 54 of the Italian Criminal Code.²⁵¹ It was thus “an imperative to arrange the immediate transfer of some of the migrants using, among other means, the ships.”²⁵² With regard to the fact that in emergency situations no formal decision had been taken to place the migrants on ships, the judge found that “this could not be regarded as unlawful arrest and that the conditions to the migrant transfer to CIEs were not satisfied underling the overcrowded condition of the facilities and the agreement with the Tunisian authorities that suggested that return of migrants should have been ‘prompt’.”²⁵³ The calculation of ‘reasonable time’ had to take into account the logistical difficulties and the number of migrants concerned.²⁵⁴ In addition, the judge’s opinion was that “no malicious intent was to be attributed to the authorities”, whose conduct was pushed by the public interest preventing to them any unfair harm (*danno ingiusto*), according to article 2043²⁵⁵ of the Italian Civil Code.²⁵⁶ Further attention was also given to the conditions of health on the

²⁴⁶ F. Tumminello, L’Italia e la gestione dei migranti: il caso Khlaifia c. Italia, 4 April 2019

²⁴⁷ I. Wuerth, *Intrenational Decisions*, The American Society of International Law, 2018

²⁴⁸ Final Judgment Khlaifia and Other v. Italy, Application no. 16483/12, Grand Chamber, Strasbourg 15 December 2016

²⁴⁹ Ibid. 215

²⁵⁰ Causa Khlaifia e altri c. Italia, [GC], Sentenza Strasburgo, 15 Dicembre 2016. Retrieved from:

http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Khlaifia_e_altri_c_Italia.pdf

²⁵¹ Codice Penale, Libro Primo- Dei Reati in Generale, Titolo III del Reato, Capo I- Del Reato Consumato o Tentato, Art 54- Stato di Necessità, 19 Ottobre 1930, n. 1398

²⁵² I. Wuerth, *Intrenational Decisions*, The American Society of International Law, 2018

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Codice Civile, Libro Quarto – delle obbligazioni, Titolo IX- Dei Fatti Illeciti, Art. 2043

²⁵⁶ Final Judgment Khlaifia and Other v. Italy, Application no. 16483/12, Grand Chamber, Strasbourg 15 December 2016

ships: after some careful and prompt checks, carried out also by a member of the Italian parliament that boarded the ship in the port of Palermo (as a press agency note of 25 September 2011 records), it was discovered that the migrants were “in good health, receiving assistance and that they were sleeping in cabins containing bed linen or reclining seats with medical assistance on place or at the hospital.”²⁵⁷ The MP that inspected the situation on the ships was also able - with the assistance of the Civil Protection Authority (*Protezione Civile*)²⁵⁸ - to talk with some migrants and confirm the fulfilling needs of access to food, rooms, clothes and prayer rooms.²⁵⁹ Regarding the allegation of migrants being kept under arrest and surveillance, a controversial photograph was published in a newspaper showing one of them with “his hands bound by black ribbons and in the company of a police officer”; the judge stated that “the man in the picture was found to be one of a small group of migrants that, fearing the immediate removal, attempted acts of self-harm leading to the restraint, the ribbons, to prevent him to commit violent acts against himself and against unharmed and unequipped police officers.”²⁶⁰ The “state of necessity” as established under Article 54 of the Italian Criminal Code,²⁶¹ was held by the judge as justifying the conduct of the police officers in any event. Moreover, the mental and physical elements of offence provided for in Articles 323²⁶² and 606²⁶³ of the Criminal Code were allegedly proved to not having been violated due to a lack of evidence.²⁶⁴

3.2 The Agrigento Judge of Peace: the annulment of the refusal-of-entry orders

Two other migrants, victims of the issue of a refusal-of-entry order, challenged those orders before the Agrigento Judge of Peace that annulled them basing on “the lack of reasonably short time after the identification of the unlawful immigrant.”²⁶⁵ As a matter of fact, the judge observed that “the complainants had been found on the Italian Territory on 6 May and 18 September 2011 respectively and that the orders at issue had been adopted only on 16 May and 24 September 2011.”²⁶⁶ In the meantime, while the judge acknowledged that Article 10 of the Legislative Decree no. 286 of 1998²⁶⁷ displayed any time-frame for adoption of such order, he took the view that “a measure concerning the restriction of freedom of the person

²⁵⁷ Final Judgment *Khlaifia and Other v. Italy*, Application no. 16483/12, Grand Chamber, Strasbourg 15 December 2016

²⁵⁸ The *Protezione Civile* (Civil Protection) it is a structure of the Italian Presidency of the Council of Ministers. It was established to guarantee to the country the means to mobilize and coordinate all national resources to assist the population in case of a serious emergency.

²⁵⁹ *Causa Khlaifia e altri c. Italia*, [GC], Sentenza Strasburgo, 15 Dicembre 2016. Retrieved from: http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Khlaifia_e_altri_c_Italia.pdf

²⁶⁰ I. Wuerth, *International Decisions*, The American Society of International Law, 2018

²⁶¹ Codice Penale, Libro Primo- Dei Reati in Generale, Titolo III del Reato, Capo I- Del Reato Consumato o Tentato, Art 54- Stato di Necessità, 19 Ottobre 1930, n. 1398

²⁶² Codice Penale, Libro Secondo- Dei Delitti in Particolare, Titolo II- Dei Delitti Contro la Pubblica Amministrazione, Capo I- Dei Delitti dei Pubblici Ufficiali Contro la Pubblica Amministrazione, Art. 323- Abuso d’Ufficio, 19 Ottobre 1930, n. 1398

²⁶³ Codice Penale, Libro Secondo- Dei Delitti in Particolare, Titolo XII- Dei Delitti Contro la Persona, Capo III- Dei Delitti dei Pubblici Ufficiali Contro la Libertà Individuale, art. 606, 19 Ottobre 1930, n.1398

²⁶⁴ Final Judgment *Khlaifia and Other v. Italy*, Application no. 16483/12, Grand Chamber, Strasbourg 15 December 2016

²⁶⁵ *Ibid.* 230

²⁶⁶ *Ibid.* 257

²⁶⁷ Decreto Legislativo 25 Luglio 1998 n. 286, Testo Unico delle Disposizioni Concernenti la Disciplina dell’Immigrazione e norme sulla condizione dello Straniero, Gazzetta Ufficiale n.191 del 18 Agosto 1998- Supplemento Ordinario n.139

had to be taken within a reasonable short time after identification of the unlawful immigrant.”²⁶⁸ For this reason, the judge stated that “this ‘*de facto*’ detention of the migrant, in the absence of any reasoned decision of the authority, amounted as an infringement of the Italian Constitution under article 13²⁶⁹ that protects the inviolability of personal liberty underlining that ‘no one should be detained, inspected or searched or otherwise subjected to any restriction of personal liberty except by a reasoned order of a judicial authority and only in such cases and in such manners provided by law.’”²⁷⁰ Only under exceptional circumstances and conditions of necessity and urgency defined by law, “the police may take provisional measures that shall be referred within 48 hours to a judicial authority and which, if not validated by the latter in the following 48 hours, shall be deemed withdrawn and ineffective.”²⁷¹ Moreover, the article goes on by stating that “any act or mental violence against a person subjected to a restriction of liberty shall be punished and that the law shall establish a maximum duration of any preventive measure of detention.”²⁷²

3.3 The intervention of the Italian Senate: conditions in the Lampedusa CSPA

On the 6 of March 2012, the Italian Senate’s Special Commission for Human Rights intervened approving a report “on the state of [respect of] human rights in prisons and detention centers in Italy” describing the Lampedusa CSPA as “prolonging the stays of migrants over twenty days without there being any formal decision as to the legal status of the person being held. This status of prolonged detention led as a consequence to heightened tension and cases of self-harm brought about also due to the scarce conditions of living in the center.”²⁷³

3.4 The European Court of Human Rights (ECtHR): allegation of violation of articles 3, 4 protocol 4, 5 and 13

The case was brought before the ECtHR following the Article 34 of the European Convention on Human Rights, on the 9 of March 2012 with application no. 16483/12 filed against the Republic of Italy. In the application, the Tunisian nationals alleged that they had been kept in confinement in a reception center for irregular migrants in breach of Articles 3 and 5 of the Convention.²⁷⁴ They also endorsed that “they had been subjected to a collective expulsion and that, under Italian law, they had had no effective remedy by which to complain of the violation of their fundamental rights.”²⁷⁵ After this first stage, the application was allocated to the Second Section of the Court and on 27 November 2012 notice of the application was given to the

²⁶⁸ Ibid. 230

²⁶⁹ La Costituzione, Parte I Diritti e Doveri dei Cittadini, Titolo I Rapporti Civili, Art. 13

²⁷⁰ Codice Penale, Libro Secondo- Dei Delitti in Particolare, Titolo XII- Dei Delitti Contro la Persona, Capo III- Dei Delitti dei Pubblici Ufficiali Contro la Libertà Individuale, art. 606, 19 Ottobre 1930, n.1398

²⁷¹ Ibid.

²⁷² La Costituzione, Parte I Diritti e Doveri dei Cittadini, Titolo I Rapporti Civili, Art. 13

²⁷³ Final Judgment Khlaifia and Other v. Italy, Application no. 16483/12, Grand Chamber, Strasbourg 15 December 2016, para 35.

²⁷⁴ Ibid. para 2

²⁷⁵ Final Judgment Khlaifia and Other v. Italy, Application no. 16483/12, Grand Chamber, Strasbourg 15 December 2016, para 3

government.²⁷⁶ On 1 September 2015 a Chamber of that section, delivered a judgment declaring by a majority the application to be considered partly admissible detecting unanimously violations of Article 5 §§ 1, 2, 4 of the Convention,²⁷⁷ by five votes to two that there had been a violation of Article 3 of the Convention²⁷⁸ on account of the conditions in which applicants were held in the Early Reception and Aid Center (CSPA) of Contrada Imbriacola and violations of Article 4 of Protocol NO. 4 to the Convention²⁷⁹ and Article 13 of the Convention.²⁸⁰

3.5 Article 5 and the Khlaifia case: decision and reasoning

The applicants contested the violation of article 5 of the ECtHR, more specifically paragraphs 1,2,4. The first paragraph was aimed to having been violated due to the detention in an incompatible manner with the conditions defined under the lawful deprivation of personal liberty of the individual and article 5 § 2 due to the lack of any notice or explanation regarding the motives behind their detention.²⁸¹ Article 5 § 4 was violated due to the absence of any possibility of contestation of the legality of the detention.²⁸² As a matter of fact, the Grand Chamber stated that Italy's violated the Article because "migrants cannot be detained in emergency accommodations without a clear legal basis for doing so."²⁸³ Article 5,²⁸⁴ as already stated in the introductory chapter "is concerned with a person physical liberty and its aim is to ensure that no one should be dispossessed of such liberty in an arbitrary fashion".²⁸⁵ Establishing the terms in order to determine if a person was deprived of his liberty, Article 5²⁸⁶ specifies that "the starting point must be his or her concrete situation, and account must be taken of a whole range of criteria such as type, duration, effects and manner of implementation of the measure in question." ²⁸⁷ On the other side, the Italian Government argued that article 5 § 1 complaint was seen as "falling outside the scope *ratione materiae* of the Convention, underlying the role of the CSPA as a reception center for first aid and assistance and that applicants were in fact not detained."²⁸⁸ The ships were to be considered as "an extension of the CSPA which authorities were compelled to use due

²⁷⁶ Causa Khlaifia e altri c. Italia, [GC], Sentenza Strasburgo, 15 Dicembre 2016, para 4

²⁷⁷ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 5, 4 November 1950

²⁷⁸ Ibid., art. 3

²⁷⁹ Ibid. 244, art. 4 protocol NO. 4

²⁸⁰ Ibid. 244, art. 13

²⁸¹ A. Giliberto, Lampedusa: La Corte EDU condanna l'Italia per la gestione dell'emergenza sbarchi nel 2011, **C. eur. dir. uomo., sez. II, sent. 1 settembre 2015, Khlaifia e altri c. Italia**, retrieved from: <https://www.penalecontemporaneo.it/d/4209-lampedusa-la-corte-edu-condanna-l-italia-per-la-gestione-dell-emergenza-sbarchi-nel-2011>

²⁸² Ibid.

²⁸³ I. Wuerth, International Decisions, The American Society of International Law, 2018

²⁸⁴ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 5

²⁸⁵ Final Judgment Khlaifia and Other v. Italy, Application no. 16483/12, Grand Chamber, Strasbourg 15 December 2016, para. 64

²⁸⁶ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 5

²⁸⁷ I. Wuerth, International Decisions, The American Society of International Law, 2018

²⁸⁸ ECtHR- Khlaifia and Others v. Italy (no. 16483/12), 1 September 2015, retrieved from <https://www.asylumlawdatabase.eu/en/content/ecthr-khlaifia-and-others-v-italy-no-1648312-1-september-2015>

to the situation of humanitarian emergency and in view of the destruction of the CSPA, in order to ensure the safety of the migrants and local population.”²⁸⁹ The prompt response of the Court was based on the understanding of the difference between the deprivation of liberty under Article 5 § 1 and a restriction to the freedom of movement under Article 2 Protocol 4 ECHR.²⁹⁰ The difference lies in “the degree or intensity rather than the nature or essence and the purpose of the former provision was to ensure that no one was arbitrarily deprived of their physical freedom.”²⁹¹ In evaluating so, the Court considered the reports of the judge of peace of Agrigento and the Italian Senate which found that “the condition to which migrants were subjected amounted to detention.”²⁹² The Court concluded that, even if the CSPA was not considered a detention center by domestic law, the nature of the conditions amounted to a deprivation of liberty under article 5 § 1.²⁹³ Moreover, since the applicants had been placed in the CSPA and had received no formal detention decision, even pursuant to the bilateral agreement between Italy and Tunisia, there were no legal basis to be found and detention under the exhaustive grounds of Article 5 were inaccessible to applicants, failing to protect the Tunisian nationals under the principle of arbitrariness or meet the principle of legal certainty, leading to the consequent violation of Article 5 § 1.²⁹⁴ In particular the Grand Chamber found that “the deprivation of liberty fell under Article 5(1)(f) of the Convention and notably that it sought to prevent them from effecting an unauthorized entry.”²⁹⁵ Since Article 5(1)(f) justifies deprivation of liberty only if deportation or extradition proceedings are in process, the detention of the applicants was unlawful and the Court rejected Italy’s argument that “Article 5(1)(f) did not apply because the migrants were not being held pending deportation or extradition but had merely been allowed to temporarily enter Italy.”²⁹⁶ Nonetheless, it underlined that “there was no basis for this deprivation under national law since the legal conditions for placing the applicants in a pre-removal center were not fulfilled, and national law did not provide for deprivation of liberty in cases of temporary stay in Italy on public assistance grounds, although it allowed for them to be subject to a refusal of entry and to removal procedures.”²⁹⁷ Furthermore, the Grand Chamber supported the fact that the applicants were actually unable to enjoy the fundamentals of *habeas corpus*, in order to challenge their deprivation of liberty.²⁹⁸ As a consequence, “it found detention to be arbitrary and failing to respond to the requirements of the Convention under Article 5(1) ECHR.”²⁹⁹ With regard to the abovementioned question, the Court underlined that “the only

²⁸⁹ Ibid.

²⁹⁰ EctHR- Khlaifia and Others v. Italy (no. 16483/12), 1 September 105, retrieved from <https://www.asylumlawdatabase.eu/en/content/ecthr-khlaifia-and-others-v-italy-no-1648312-1-september-2015>

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ L.T, Louvain- La Neuve, Refining the prohibition of collective expulsion in situation of mass arrival: a balance well struck?, EctHR- Khlaifia and Others v. Italy (no. 16483/12), 7 June 2017, retrieved from: https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/ecthr-15-december-2016-khlaifia-and-others-v-italy-gc-app-n-16483-12.html#_ftn1

²⁹⁶ I. Wuerth, *Intrenational Decisions*, The American Society of International Law, 2018

²⁹⁷ EctHR- Khlaifia and Others v. Italy (no. 16483/12), 1 September 105, retrieved from <https://www.asylumlawdatabase.eu/en/content/ecthr-khlaifia-and-others-v-italy-no-1648312-1-september-2015>

²⁹⁸ Ibid.

²⁹⁹ Ibid.

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lawful form of detention that a migrant can face, for reason connected with his or her irregular presence on the Italian territory, is established in Article 14 D. Lgs n.286 of 1998.”³⁰⁰ The test of this article regarding immigration and the due expulsion of irregular migrants, identifies as lawful detention the one that is carried out in Centers for the Identification and Expulsion (CIEs) that guarantees the jurisdictional control over the legality of the process.³⁰¹ Moreover, it was also underlined that Article 10 D.Lgs n. 286 of 1998 ³⁰² even recognizing differed refusal (*respingimenti differiti*) does not include any form of deprivation of the liberty of the individual.³⁰³ Furthermore, the Court found Italy to be in further violation of Article 5 because the country conceded that the applicants’ detention was not conducted pursuant to its own domestic law: “Italian immigration law authorizes detention only within CIEs, which are judicially supervised, thereby allowing migrants to challenge their detention and the conditions in which they are confined.”³⁰⁴ The CSPA hotspot and the ships, by contrast, were not detention facilities, and migrants had not possibility to access judges there, leading the Court to held that the secret agreement between Italy and Tunisia was not enough to provide the basis for detention because the text was not public and was not accessible to the applicants. Consequently, without a legal basis for detention, Italy could not have informed the applicants of the reason for depriving them of liberty or how to challenge that deprivation, in violation of Article 5(2).³⁰⁵ In addition to arbitrariness, the Grand Chamber found that “the applicants had only been informed as to the reasons of their deprivation of liberty very belatedly, thus violating also Article 5(2) ECHR.”³⁰⁶ Eventually, the Court concluded that “the Italian legal system did not provide them with a remedy whereby they could challenge the lawfulness of their detention thus violating also Article 5(4) ECHR.”³⁰⁷ The Italian government contested this resolution justifying that “the refusal-of-entry notified to the Tunisian nationals, could have been contested before the judge of Peace of Agrigento as some nationals did.”³⁰⁸ However, due to the fact that applicants were not informed regarding the reasons of their detention, this was enough to ascertain the violation of Article 5 § 4 *ad abundantiam*: even with the judicial contestation of the legality of the refusals- to-entry, the fact that those

³⁰⁰ Testo Unico sull’immigrazione, Titolo II-Disposizioni sull’ingresso, il soggiorno e l’allontanamento dal territorio dello stato, capo II-controllo delle frontiere, respingimento ed espulsione, art. 14

³⁰¹ EctHR- Khlaifia and Others v. Italy (no. 16483/12), 1 September 2015, retrieved from <https://www.asylumlawdatabase.eu/en/content/ecthr-khlaifia-and-others-v-italy-no-1648312-1-september-2015>

³⁰² Ibid, art 10

³⁰³ A. Giliberto, Lampedusa: La Corte EDU condanna l’Italia per la gestione dell’emergenza sbarchi nel 2011, **C. eur. dir. uomo., sez. II, sent. 1 settembre 2015, Khlaifia e altri c. Italia**, retrieved from:

<https://www.penalecontemporaneo.it/d/4209-lampedusa-la-corte-edu-condanna-l-italia-per-la-gestione-dell-emergenza-sbarchi-nel-2011>

³⁰⁴ Ibid. 210

³⁰⁵ I. Wuerth, International Decisions, The American Society of International Law, 2018

³⁰⁶ EctHR- Khlaifia and Others v. Italy (no. 16483/12), 1 September 2015, retrieved from <https://www.asylumlawdatabase.eu/en/content/ecthr-khlaifia-and-others-v-italy-no-1648312-1-september-2015>

³⁰⁷ L.T. Louvain- La Neuve, Refining the prohibition of collective expulsion in situation of mass arrival: a balance well struck?, EctHR- Khlaifia and Others v. Italy (no. 16483/12), 7 June 2017, retrieved from: https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/ecthr-15-december-2016-khlaifia-and-others-v-italy-gc-app-n-16483-12.html#_ftn1

³⁰⁸ A. Giliberto, Lampedusa: La Corte EDU condanna l’Italia per la gestione dell’emergenza sbarchi nel 2011, **C. eur. dir. uomo., sez. II, sent. 1 settembre 2015, Khlaifia e altri c. Italia**, retrieved from: <https://www.penalecontemporaneo.it/d/4209-lampedusa-la-corte-edu-condanna-l-italia-per-la-gestione-dell-emergenza-sbarchi-nel-2011>

decrees were notified immediately before the actual repatriation consisted of a limit for the applicants to accede to a mean of legal protection.³⁰⁹

3.6 Application of article 41 of the Convention: just satisfaction

After the findings of the Court, the application of Article 41 of the ECtHR was necessary to partially repair the victims. As a matter of fact, the article provides that:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”³¹⁰

Using the test of this article, the applicants claimed a 65000 euros damage each in respect to the non-pecuniary damage inflicted upon them during the whole process, justifying the cost on the matter of gravity of the violations of which they were victims.³¹¹ The Italian government contested the view of the Tunisian nationals objecting that their claims for just satisfaction were ‘unacceptable’, leading to the concluding compensation established by the Court of 2500 euros each applicant, amounting to a total of 7500 euros for the three applicants.³¹² For what concerns the pecuniary damage that was considered to be inflicted on the victims, the applicants claimed 25236.89 euros for the costs and expenses incurred by them before the Court, taking into account the travel expenses of their representatives to meet them in Tunis, the expenses in which their representatives occurred for attendance at the Grand Chamber, the translation of observations before the Chamber and the Grand Chamber, the consultation of lawyers specialized in international human right law and a lawyer specializing in immigration law and the fees of their representatives in the proceedings before the Court.³¹³ The Italian Government submitted no observations on this point while the Court underlined that “an applicant is entitled to the reimbursement of costs and expenses only in so far that these have been actually and necessarily incurred and are reasonable as to quantum.”³¹⁴ In this case, the Court considered excessive the total sum claimed for the total costs and expenses incurred in the proceeding and lowered the compensation to 15000 euros under that head to the applicants jointly.³¹⁵

4. The role and impact of the Klhaifia case: from the legal to the humanitarian point of view

³⁰⁹ Ibid. 274

³¹⁰ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 41

³¹¹ Final Judgment Klhaifia and Other v. Italy, Application no. 16483/12, Grand Chamber, Strasbourg 15 December 2016, para. 283

³¹² Ibid. para. 284-285

³¹³ Ibid. para. 286

³¹⁴ Final Judgment Klhaifia and Other v. Italy, Application no. 16483/12, Grand Chamber, Strasbourg 15 December 2016, para. 287-288

³¹⁵ Final Judgment Klhaifia and Other v. Italy, Application no. 16483/12, Grand Chamber, Strasbourg 15 December 2016, para. 287-288

After the conclusion of the case some attention has to be given to the results and impacts of the decisions on the legal and humanitarian point of view. The facts relating to the European Court of Human Rights (ECtHR) Grand Chamber's judgment of the case, are as relevant today as they were in 2011 since Member States continue to face increased arrivals of migrants who are entitled of international protection and other needs.³¹⁶ With reference to the rulings to Article 5 of the ECHR, the judgements represents a major advancement in the protection of those people that, even today, are crossing the European borders despite not having any valid documentation.³¹⁷ For Italy and other States, the *Khlaifia* decision consist in a "mixed result."³¹⁸ The outcomes of the process may require States to modify their laws concerning procedural rights of migrants because, even if State laws already include appropriate procedural guarantees for migrants, the decision sets up a conflict between State law and EU policies.³¹⁹ While the case under exam was still pending, the EU's employment of hotspots in countries like Italy and Greece continued.³²⁰ The European Union has ruled out this 'hotspot approach' which concerns "inter-agency collaboration in border areas, where deployed national experts under the coordination of a specific agency operationally assist national administrations."³²¹ The EU pressured the two countries in creating their own hotspots comprehensive of "designated facilities for the identification, registration, fingerprinting and information-provision³²² of arrivals and some asylum procedures, failing however to define these hotspots or authorize detention there, even if EU staff members are involved there."³²³ However, this judgment also leads to a greater leeway to States in managing mass influxes of migrants: when States face large migration flows, they may be left without the resources to provide accommodations that meet their usual standards or be able to provide these accommodations as soon as they are needed.³²⁴ Moreover, the conclusion of the judgement gives to State the possibility to expel migrants without conducting individualized asylum screenings, as long as migrants are notified of the pending challenge

³¹⁶ L.T. Louvain- La Neuve, Refining the prohibition of collective expulsion in situation of mass arrival: a balance well struck?, EctHR- Khlaifia and Others v. Italy (no. 16483/12), 7 June 2017, retrieved from: https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/ecthr-15-december-2016-khlaifia-and-others-v-italy-gc-app-n-16483-12.html#_ftn1

³¹⁷ S. Zirula, S. Peers, A template for protecting human rights during the 'refugee crisis'? Immigration detention and the expulsion of migrants in a recent ECtHR Grand Chamber ruling, 5 January 2017

³¹⁸ I. Wuerth, Intrenational Decisions, The American Society of International Law, 2018

³¹⁹ Ibid.

³²⁰ See Amnesty International, Italy: Beatings and Unlawful Expulsions Amid EU Push to Get Tough on Refugees and Migrants (Nov. 3, 2016), at <https://www.amnesty.org/en/latest/news/2016/11/italy-beatings-and-unlawful-expulsions-amid-eu-push-to-get-tough-on-refugees-and-migrants>; European Council on Refugees and Exiles, The Implementation of the Hotspot Approach in Italy and Greece: A Study (2016), available at <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf>.

³²¹ E. Tsourdi, 'Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office' (2016) 1(3) *European Papers* 997, 1015. See also Communication COM (2015) 490 final of 23 September 2015 of the Commission, Annex II to the Communication on Managing the Refugees Crisis: Immediate Operational, Budgetary and Legal Measures under the European Agenda on Migration.

³²² L.T. Louvain- La Neuve, Refining the prohibition of collective expulsion in situation of mass arrival: a balance well struck?, EctHR- Khlaifia and Others v. Italy (no. 16483/12), 7 June 2017, retrieved from: https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/ecthr-15-december-2016-khlaifia-and-others-v-italy-gc-app-n-16483-12.html#_ftn1

³²³ D. Neville, S. Sy & A. Rigon, On the Frontline: The Hotspot Approach to Managing Migration, EUROPEAN PARLIAMENT, DIRECTORATE-GENERAL FOR INTERNAL POLICIES 29 (2016), available at http://www.euro-parl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU%282016%29556942_EN.pdf.

³²⁴ I. Wuerth, Intrenational Decisions, The American Society of International Law, 2018

of deportation.³²⁵ For this reasons, *Khlaifia* can be followed by the interpretation that “States are exempted to the burden of ensuring that migrants understand their procedural rights due to the fact that in the case, the guarantee of the Court of the provision to the Tunisian nationals of a document granting them refusal-to-entry-order, properly translated in their own language, appears sufficient.”³²⁶ The decision places no affirmative obligations on States to inform migrants of the rights of non-refoulment³²⁷ or other international protection.³²⁸

Likewise, from the human right perspective, the *Khlaifia* case has led to mixed result. The ruling of the case made the scope of the Article 5 of the ECtHR wider, by explicitly requiring States to apply transparent and specific domestic laws, guaranteeing from that moment on that migrants and other non-citizens must enjoy the access to the legal basis for their detention and effective opportunities to challenge the conditions of their confinement and the legality of their detention.³²⁹ In addition, State laws must delineates substantives requirements and procedural guarantees for migrant detainees.³³⁰ Moreover, the Court did not miss the chance to underline that Article 5’s prohibition on the deprivation of liberty “cannot be eroded, even if a country is facing an extreme context of migratory crisis.”³³¹ On the contrary, it might even rise.³³² It holds true that the facts observed in *Khlaifia* did not take place during the climax of migration crisis but it has to be considered that in that period, between 2011/2012, Italy was already facing a severe migratory pressure that eventually led the Government of country to a declaration of the state of Humanitarian Emergency and issuing a call for solidarity among Member States.³³³ However, the Strasbourg judges, even acknowledging the limitations of resources and the high number of migrants in the country, considered that these crisis could also require more attention from the authorities.³³⁴ The presence of a bilateral agreement between two countries (as in the case Tunisia and Italy) was considered by a Court as not to constituting a substitute of international law, strengthening the fact that there can be no dilution of the fundamental safeguard around the prohibition of arbitrariness.³³⁵ In this way it was a further mean to underline “the fight against generalized regimes of deprivation of liberty in view of achieving pending return.”³³⁶ Also at the EU level, the recast asylum

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ The principle of non-refoulment as specified in article 33 of the Convention Relating to the Status of Refugees, 1951

³²⁸ I. I. Wuerth, *International Decisions*, The American Society of International Law, 2018

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ Ibid.

³³² A.R. Gil, “Collective expulsions in times of migratory crisis: Comments on the *Khlaifia* case of the ECHR”, in *EU Migration Law Blog*, 11 February 2016.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ L.T. Louvain- La Neuve, *Refining the prohibition of collective expulsion in situation of mass arrival: a balance well struck?*, *ECtHR- Khlaifia and Others v. Italy* (no. 16483/12), 7 June 2017, retrieved from: https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/ecthr-15-december-2016-khlaifia-and-others-v-italy-gc-app-n-16483-12.html#_ftn1

³³⁶ L.T. Louvain- La Neuve, *Refining the prohibition of collective expulsion in situation of mass arrival: a balance well struck?*, *ECtHR- Khlaifia and Others v. Italy* (no. 16483/12), 7 June 2017, retrieved from: https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/ecthr-15-december-2016-khlaifia-and-others-v-italy-gc-app-n-16483-12.html#_ftn1

instruments oppose mandatory detention.³³⁷ The Grand Chamber, throughout all its reasoning regarding the case, reserved particular attention on the massive nature of the arrivals stating that: “*it would certainly be artificial to examine the facts of the case without considering the general context in which they arose.*”³³⁸ Even if the presence of this context was always present and taken into account throughout the reasoning, the failure to demand a personalized interview as a part of the identification problem, it is considered to be an element that could lead asylum seekers to not be properly identified.³³⁹ In addition, due to the vague standards of a ‘genuine and effective possibility to submit arguments’, the operationalization in cases of mass arrivals will be extremely difficult due to the fact that reception and detention facilities function in overcapacity and the process of initial identification is based on standardized forms.³⁴⁰ As the phenomenon of migration to Europe continues, it remains to be seen whether the *Khlaifia* case will have an influence over States’ behavior, causing better procedural guarantees for migrants, and it might also happen that, on the contrary, it will open the door for the perpetuated erosion of rights guaranteed by the ECHR.³⁴¹ In regard of recent cases analogues to the *Khalifia* one, it is necessary to refer to October 2016, when Amnesty International released a report wherein it denounces the practices of arbitrary detention carried out within the new “Hotspot” located at the European borders.³⁴² Hereinafter, “if the Member States continue to find the deprivation of liberty as a necessary tool to contrast illegal migration, they must adopt laws that clearly govern the substantive requirements and procedural guarantees with attentive reference to the right of *habeas corpus*.”³⁴³ However, in order to guarantee to States to effectively maintain the level prescribed by the Convention, in times of migratory crisis, they should count on solidarity of other Member States, that leads to the sharing of both resources and burdens between the actors.³⁴⁴ This solidarity it is deemed necessary, becoming the condition that would allow the Member States themselves to fully respect the rights enshrined in the European Convention preventing convictions of the States faced with extraordinary migratory pressure.³⁴⁵ An example of this solidarity can be seen in the two decisions of the Council aimed at guaranteeing “operational support to Italy and Greece”.³⁴⁶ These decisions create an obligation for the other Member States to “increase their operational support in cooperation with Italy and Greece in the area of international protection through relevant activities coordinated

³³⁷ See Directive 2013/32/EU on Common Procedures for Granting and Withdrawing International Protection (Recast), OJ L 180/60; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L180/96.

³³⁸ ECtHR, *Khlaifia and others v Italy* (GC), op. cit., § 185.

³³⁹ A.R. Gil, “Collective expulsions in times of migratory crisis: Comments on the *Khlaifia* case of the ECHR”, in *EU Migration Law Blog*, 11 February 2016.

³⁴⁰ *Ibid.*

³⁴¹ I. Wuerth, *Intrenational Decisions*, The American Society of International Law, 2018

³⁴² See Amnesty International, *Hotspot Italy. How EU’s flagship approach leads to violations of refugee and migrant rights*, p. 26-29

³⁴³ *Ibid.*

³⁴⁴ *Ibid.* 308

³⁴⁵ I. Wuerth, *Intrenational Decisions*, The American Society of International Law, 2018

³⁴⁶ See 1st Emergency Relocation Decision, Art. 7 and 2nd Emergency Relocation Decision, Art. 7.

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by European Asylum Support Office (EASO)³⁴⁷, Frontex³⁴⁸ and other relevant Agencies, by providing appropriate national experts.”³⁴⁹ Therefore, emergency relocation carved in this framework has the aim of establishing a renewed impetus for Member States at the external borders to implement their obligations.³⁵⁰ Hotspots and emergency relocation are in fact to be considered as complementary; emergency relocation is meant to somewhat offset the increased obligations that Member States at the external border incur under the current rules.³⁵¹ The interpretation given by the Court in the case *Klhaifia*, is consistent with the text and general schemes of the Convention and it is the only one able to guarantee protection to migrants without valid documents from potential abuses and arbitrary decision by the border authorities.³⁵² However, in this case, the Strasbourg Court has missed a vital occasion to impose a substantial level of protection of fundamental rights with regard to the migration crisis that Europe was facing.³⁵³

An important step forward in the legal influence of the case *Klhaifia* of the year 2016, the Committee of Ministers of the Council of Europe (CoE), in the decision of the 15th March 2018³⁵⁴ urges Italy to adopt effective general measures in the context of the migrant reception system.³⁵⁵ What the CoE underlined following the Italian process was the lack of accessibility to the judicial remedies before national authorities in the cases of deprivation of liberty of migrants placed in detention centers calling authorities to provide by the end of June 2018 more details on the legislative framework governing the operations of “first aid and assistance centers”.³⁵⁶ They required to the state to make clear the average length of stay of persons placed in such centers before and after their identification and the practice followed with regard to the freedom of movement of these persons after their identification.³⁵⁷ And finally, they invited the National Ombudsman for the rights of persons deprived of liberty to clarify the powers of that authority to redress the individual situation of complaints and to provide examples of measures adopted for this purpose.³⁵⁸

³⁴⁷ European Asylum Support Office, EASO, Valletta, Malta

³⁴⁸ European Border and Coast Guard Agency, FRONTEX, Warsaw Poland

³⁴⁹ See 1st Emergency Relocation Decision, Art. 7, para. 1 and 2nd Emergency Relocation Decision, Art. 7, para. 1

³⁵⁰ E. Tsourdi, ‘Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office’ (2016) 1(3) *European Papers* 997, 1015

³⁵¹ *Ibid.*

³⁵² S. Zirula, S. Peers, A template for protecting human rights during the ‘refugee crisis’? Immigration detention and the expulsion of migrants in a recent ECtHR Grand Chamber ruling, 5 January 2017

³⁵³ *Ibid.*

³⁵⁴ CM/Del/Dec(2018)1310/H46-9

³⁵⁵ Council of Europe: Italy called to take clear general measures about the migrant reception system, Human Rights Center “Antonio Papisca”, Università degli Studi di Padova, 4 April 2018, retrieved from: <http://unipd-centrodirittumani.it/en/news/Council-of-Europe-Italy-called-to-take-clear-general-measures-about-the-migrant-reception-system/4598>

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

III. Final remarks about the case *Khlaifia and Others v. Italy*

1. The paradox of human dignity in a context of cosmopolitan law

The juridical problems emerging from the judgment *Khlaifia and Others v. Italy*³⁵⁹ and the consequent breach of human rights derived from the incorrect behavior of the country under exam, highlight the post-national³⁶⁰ context of globalization.³⁶¹ During the period of the European migration crisis, countries found themselves obliged to protect human rights and fulfill their international obligations, embodied in particular in the European Convention on Human Rights (ECHR)³⁶² while wishing to maintain autonomy in the implementation of those provisions, by flexibly applying the rules laid down in the ECHR and the ECtHR jurisprudence. Therefore, it is in this context that the question of a pluralism between the national orders and the cosmopolitan normative deriving from the ECHR emerges. As a matter of fact, with the decision *Khlaifia and Others v. Italy*, the ECtHR highlights the need to discuss whether, in a context of increasingly globalized world, it is possible to “build a state of constitutionalism for the 21st century based on the excessive appreciation of the rule of law – in particular fundamental rights and constitutional jurisdiction – in detriment of the democratic principle”.³⁶³

The decision considered in this research is an undeniable demonstration of the emergence of a cosmopolitan right or global right.³⁶⁴ Indeed, the possibility for private individuals to be able to sue a State for a violation of the ECHR³⁶⁵ – thus overriding a view that public international law is a mere law between states – makes it possible to demonstrate that the rules provided for in the ECHR protect individuals from human rights violations occurring within the borders of the State and the political community in which they are located.³⁶⁶ This cosmopolitan right implies, *prima facie*, the emergence of: “a legal system in which the public authority has the obligation, within his jurisdiction, to ensure the respect for the fundamental rights of all persons, irrespective for nationality and citizenship”.³⁶⁷

The conceptualization of the idea of global right comes from the philosopher Immanuel Kant. The author understood that the existence of a global law (*Weltrecht*) establishes a global guarantee that the citizen of the world will be treated as such in all places, therefore demanding and obtaining an appropriate treatment

³⁵⁹ Grand Chamber, case of *Khlaifia and others v. Italy*, application no. 16483/12, 15 December 2016

³⁶⁰ J. Habermans, *Die Postnationale Konstellation. Essays*, Frankfurt am Main: Suhrkamp, 1998

³⁶¹ D. Held, *(Democracy and the Global Order. From the Modern State to Cosmopolitan Governance*, 1995

³⁶² European Court of Human Rights, European Convention on Human Rights, as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1,4,6,7,12,13 and 16

³⁶³ R. Medeiros, *A Constituição num contexto Global*, 2015

³⁶⁴ A. Guerreiro, A. F. Da Silva, *Lampedusa e o Paradoxo da Dignidade Humana: observações sobre o acórdão “Klhaifia e outros contra Italia” do Tribunal Europeu dos Direitos do Homem*, 3 May 2016

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.* 331

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according to his conditions.³⁶⁸ However, cosmopolitan law is still an arena for debate and divergencies that renders the cosmopolitan construction a challenge involving the national legal order: in the interaction between cosmopolitan right and sovereign national state, limits and rules are imposed and these fail to protect the rights and legal positions of refugees.³⁶⁹ Indeed, the massive number of refugees, coming in a dimension unprecedented in the 19th century, caused the most affected States to face a scenario of inadequate and insufficient³⁷⁰ human and physical resources, failing to welcome those in particular need of a way to escape the terrifying panorama in their home countries. These circumstances put the Kantian law in crisis.

The treatment of migrants as cosmopolitan citizens faces a particular dilemma: shall they be simply repatriated, or shall they be received in host countries that lack sufficient conditions to guarantee their proper human condition and their status of citizens of the world? Or otherwise, shall the host State be charged with the responsibility of the absence of those conditions stated before? The solution to these questions may come in various forms depending on the theoretical understanding of the concept of cosmopolitan law.³⁷¹ In the decision under exam, it appears that the ECtHR has been thought to embody an adequate conception of cosmopolitan law underlining its commitment to protect the human rights of any citizen in the territory of a Member State of the Contracting Parties. Under the protection of the ECHR, the cosmopolitan law ceases to be understood as a form of unitarization and forceful imposition of the values of the majority belonging to a given community³⁷² on a defined minority. As a consequence, it follows that the respective protection mechanisms are not again addressed to the citizens of a particular community but to the citizens of the world,³⁷³ allowing them to be included in a right of universal application which protects human rights and guarantee to every citizen an axiological equality.³⁷⁴ Therefore, the strengthening of the international system for the protection of human rights, leading to the affirmation of a principle of equality between citizens and non-citizens³⁷⁵, brings to a “devaluation of nationality”.³⁷⁶ In this process resides “the hope of freeing individuals from the burden of being born in an inhospitable and forgotten place on hearth”.³⁷⁷ In this sense, the option of repatriation presented in the questions above, fails to meet the duty of hospitality towards the cosmopolitan citizens leaving the floor to the other two precarious and themselves controversial options. Moreover, it has to be underlined that, according to the ECtHR, there is “a legal duty to protect, with complete dignity, foreigners who enter a territory against the rules of entry and stay of persons in force in that State.”³⁷⁸

³⁶⁸ A. Guerreiro, A. F. Da Silva, Lampedusa e o Paradoxo da Dignidade Humana: observações sobre o acórdão “*Khlaifia e outros contra Italia*” do Tribunal Europeu dos Direitos do Homem, 3 May 2016

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ D. Held, *Democracy and the Global Order. From the Modern State to Cosmopolitan Governance*, 1995

³⁷² Ibid. 335

³⁷³ A. Guerreiro, A. F. Da Silva, Lampedusa e o Paradoxo da Dignidade Humana: observações sobre o acórdão “*Khlaifia e outros contra Italia*” do Tribunal Europeu dos Direitos do Homem, 3 May 2016

³⁷⁴ J. D. Ingram, *Radical Cosmopolitics*, 2013, p.226

³⁷⁵ Office of the United Nations High Commissioner for Human Rights, *The rights of Non-citizens*, 2006

³⁷⁶ R. Medeiros, *A Constituição num contexto Global*, 2015

³⁷⁷ M.P.Roque, *O Direito Administrativo Transnacional*, 2014

³⁷⁸ G. S. Goodwin-Gill, Article 31 of the 1951 Convention Relating to the status of refugees: non-penalization, detention and protection, October 2001

When the dignity prerequisite falls short, the process will end up being a violation of the ECHR due to the lack of capacity of a State to deal with a migratory crisis or emergency situation. But how can a State be held responsible for a state of emergency that has not provoked itself? In some case, even though coastal States adopt preventive measures spreading until the high seas, aimed at reducing exposure to migratory flows, they incur in extraterritorial application of the ECHR.³⁷⁹ However, in all decisions, the Court appears to overlook the constraints that motivate some of the most vulnerable States to take preventive measures to enable them to respond as much as possible to their abilities. Indeed, it is useful to consider the long term and the role of the host State in improving the living conditions and integration of the migrants, including them in the society enabling the prevention of the eternalization of the status of migrants/non-citizens.

2. Solutions and scenarios: what has been done so far and what should be done

2.1 The Global Approach to Migration and Mobility

From year 2011, migration is at the top of the European Union's Political Agenda. Indeed, the Arab Spring and the following events in the Southern Mediterranean further highlighted "the need for a coherent and comprehensive migration policy for the EU."³⁸⁰ Maximizing the positive impact of migration on the development of partner countries, while limiting negative consequences is a key priority of a revised Global Approach.³⁸¹ As a matter of facts, a global approach to migration represents a primary need for the Union that decided to create a *Global Approach to Migration and Mobility* (GAMM), establishing a "more strategic and more efficient alignment between relevant EU policies and between the external and internal dimensions of those policies."³⁸² The GAMM, promotes dialogue and cooperation with non-EU partner countries in the area of migration and mobility.³⁸³ This is pursued with "people-to-people contacts, education and training, trade and business, cultural exchanges or visiting family members across borders."³⁸⁴ The Migration and Mobility dialogues are the drivers of the GAMM, being part of a broader framework for bilateral relations and dialogue pursued at the regional, bilateral and national level with key partner countries.³⁸⁵ As a matter of fact, Mobility Partnerships will be offered to the EU's immediate Neighborhood and to Tunisia, Morocco and Egypt

³⁷⁹ I. C. Barreto, *A Convenção Europeia dos Direitos do Homem*. 5.a ed., 2015 revista e actualizada.

³⁸⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, COM(2011) 743 final, *The Global Approach to Migration and Mobility*, 18 November 2011

³⁸¹ Commission Staff Working Paper, *Migration and Development*, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, COM(2011)743 final, *The Global Approach to Migration and Mobility*, 18 November 2011

³⁸² Ibid.

³⁸³ European Commission- Press Release, *Stronger Cooperation and mobility at the center of the renewed EU migration strategy*, 18 November 2011

³⁸⁴ Ibid.

³⁸⁵ European Commission- Press Release, *Stronger Cooperation and mobility at the center of the renewed EU migration strategy*, 18 November 2011

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guaranteeing the conclusion of visa facilitation and readmission agreements.³⁸⁶ Among the priorities of the Global Approach, one of particular interest is devoted to “the prevention and reduction of irregular migration and trafficking in human beings.”³⁸⁷ This is achieved by “transferring of skills, capacity and resources to partners in order to reduce trafficking, smuggling and irregular migration, through the enhancement of cooperation on document security and the fostering of initiatives to provide better protection and empowering victims of trafficking in human beings.”³⁸⁸ However, skepticism came from Member States and third countries. The added value of EU- based cooperation on labor migration instead of bilaterally agreed schemes, remains unclear to some Member States, as well as the question of resettlement.³⁸⁹ Some Member States “wish to retain total sovereignty in deciding how many refugees should be resettled in their country, and where they come from.”³⁹⁰ In a report to the UK House of Lords, Lord Avebury underlined that “the EU has no competence over the visa awards”³⁹¹, consequently depending in its entirety on Member States.³⁹² In addition, interviews conducted by PhD candidate N. Reslow in 2010, suggested that “many countries in the EU were skeptical in dealing with legal migration issues at the EU level because they believe it to be an area of national sovereignty.”³⁹³ Cooperation does not seem to be in the interests of all third countries; incentives offered by the EU are used as instruments to legitimize a strategy that remains EU-centered.³⁹⁴

In addition, the lack of a rights based-approach constitutes a critic coming directly from the European Council on Refugees and Exiles (ECRE)³⁹⁵: the “*migrant centered approach*” is seen as “being too weak and promoting the EU’s interests without offering tangible integration prospects to third country nationals.”³⁹⁶ Integration, is however being used as “another justification for stricter border controls” as pointed out by the Migrants’ Rights Network (MRN).³⁹⁷ The MRN denounced it as a “law and order” strategy where cooperation with third world countries served the purpose of creating stricter border controls and visa policies rather than the integration of migrants.³⁹⁸ Moreover, the strategy established by the MRN, do not contribute – in any case – to the address of irregular migration or human trafficking, reinforcing instead “the development of

³⁸⁶ Commission Staff Working Paper, Migration and Development, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, COM(2011)743 final, The Global Approach to Migration and Mobility, 18 November 2011

³⁸⁷ European Commission, Together Against Trafficking in Human Beings, Communication on the Global Approach to Migration and Mobility (GAMM)

³⁸⁸ Ibid.

³⁸⁹ M. Martin, Statewatch, The Global Approach to Migration and Mobility: the state of play, October 2012

³⁹⁰ Ibid.

³⁹¹ House of Lords, Inquiry on EU’s Global Approach to Migration and Mobility, Unrevised transcript of evidence taken before The Select Committee on the European Union Home Affairs, Health and Education (Sub-Committee F), 25 July 2012 link: <http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/GAMM/ucEUSCF250712ev6.pdf>

³⁹² Ibid. 354

³⁹³ N. Reslow, The external dimension of EU Justice and Home Affairs: the role of third countries in EU migration policy, Paper prepared for the 6th ECPR General Conference, Reykjavik, 25-27 August 2011, link: <http://www.ecprnet.eu/MyECPR/proposals/reykjavik/uploads/papers/59.pdf>

³⁹⁴ Ibid. 354

³⁹⁵ European Council on Refugees and Exiles (ECRE) is a Brussels based NGO that protects and advances the rights of refugees, asylum seekers and displaced persons

³⁹⁶ Ibid.

³⁹⁷ Migrants’ Rights Network is a London Based Non-Governmental Organization working for a rights-based approach to migration

³⁹⁸ M. Martin, Statewatch, The Global Approach to Migration and Mobility: the state of play, October 2012

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alternative strategies to circumvent the difficulty of entering the EU legally.”³⁹⁹ Nevertheless, the reception of refugees and asylum seekers depends on a country’s capacity to integrate vulnerable populations which, in the case of existing and prospective partners seems unrealistic.⁴⁰⁰ Protection in the region of origin is considered to be the “preferred protection modality”⁴⁰¹ enhancing the chances for a sustainable durable solution consisting in local integration and resettlement.⁴⁰² Further to NGOs’ criticism, the European Committee of the Regions (CoR) ⁴⁰³ highlighted that “the provision of regular entry channels is a key instrument in combating irregular immigration, ensuring a degree of solidarity in relations with countries of origin of migratory flows.”⁴⁰⁴ In the CoR opinion, the GAMM does not really take into account that addressing irregular immigration cannot be limited to border controls.⁴⁰⁵ It should also be based on effective legal entry opportunities which are also opened to less-skilled workers.⁴⁰⁶

2.2 Revising the Dublin Regulation

The question unsolved is whether a temporary reception with limited hygiene and space in a crisis scenario can be considered as an effective breach of the ECHR. Migrants, being in a particular and fragile situation require reception conditions being good enough to alleviate their great sufferings. However, if these conditions are not met the judgment deriving from complaints of applicants will constitute a breach of the ECHR.⁴⁰⁷ As a matter of fact, the Charter promotes the protection of the dignity of the human person and personal rights, being “an unconditional part of the judgment in itself, sometimes ignoring factors that can be decisive in determining the actual conditions that migrants will face in the arrival’s country.”⁴⁰⁸ This unbalanced condition in the judgments can cause great harm in the welcoming countries due to the rapid deployment of means that states will not be able to match without a conspicuous financial sacrifice that may not be able to afford. As a matter of fact, in addition to the ECHR, there may also be a question of compliance with the Council Directive laying down minimum standards for asylum seekers in the Member States.⁴⁰⁹ In addition, due to the lack of proper structures in host countries, the migrants that succeeds to entry the European Union, are confronted with a “bureaucratic asylum procedure being often prevented from travelling to their last destination.”⁴¹⁰ The

³⁹⁹ Ibid.

⁴⁰⁰ Ibid.

⁴⁰¹ UNHCR, The 2012 State of the World’s Refugees <http://www.unhcr.org/4fc5ceca9.html>

⁴⁰² Ibid.

⁴⁰³ The European Committee of Regions (CoR) is the European Union’s assembly of local and regional representatives that provides sub-national authorities with a direct voice within the EU’s institutional framework.

⁴⁰⁴ Committee of the Regions, Opinion on the Global Approach on Migration and Mobility, 96th plenary session, 18 and 19 July 2012

⁴⁰⁵ Migrants’ Rights Network is a London Based Non-Governmental Organization working for a rights-based approach to migration

⁴⁰⁶ Ibid. 370

⁴⁰⁷ Grand Chamber, case of *Khlaifia and others v. Italy*, application no. 16483/12, 15 December 2016

⁴⁰⁸ European Convention on Human Rights

⁴⁰⁹ Commission Directive 2003/9/EC, laying down minimum standards for the reception of asylum seekers, 27 January 2003

⁴¹⁰ E. Van Trigt, *The EU Migration Crisis and Moral Obligations*, 2015

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main reason is certainly the enactment of the Dublin Regulation⁴¹¹, the most important element of the European common asylum system,⁴¹² that allows European Union Countries to deport migrants back to the first country where they entered the Union⁴¹³ even if migrants themselves do not actually wish to stay in that country. The Dublin regime was first established by the Dublin Convention, signed in Dublin, Ireland, on 15 June 1990.⁴¹⁴ The first regulation, established in 2003, was “not created with the aim of redistributing asylum applications among Member States⁴¹⁵ but to assign responsibility for processing an asylum application to a single Member State.”⁴¹⁶ As a consequence, when the number of immigrants started to increase during the migration crisis, border countries like Italy and Greece started to fall under the weight of numerous asylum requests.⁴¹⁷ The Dublin Regulation has been therefore seen as a boundary to an even allocation of migrants in the EU⁴¹⁸, being also a threat to the free movement in the passport free zone of 26 countries promoted by the Schengen agreement.⁴¹⁹ It should be considered that, since 2009, the Parliament invokes a total revision of the Dublin regulation.⁴²⁰ Indeed, between May and June 2016, the European Commission started a process of modification of the European Common Asylum System (ECAS) aiming at strengthening the role of article 80 TFEU.⁴²¹ The first results were seen in a variation proposal of September 2015⁴²², the Dublin III and in the proposal Dublin IV.⁴²³ However, Dublin III failed to contrast the migratory crisis.⁴²⁴ For this reason, in the proposal of Dublin IV, the Commission substituted the mechanism of rapid alert and management in case of crisis with a “mechanism of corrective assignation” in the eventuality that a State will have to face a disproportionate number of asylum requests.⁴²⁵ This disproportionality rate is reached when a Member State face an asylum request number above 150% of the reference share.⁴²⁶ In the eventuality that a Member State decided not to accept the allocation of asylum-seekers from another one under pressure, a “solidarity contribution” per applicant would have to be made instead.⁴²⁷ “New arrivals to Member States benefiting from

⁴¹¹ Regulation (EU) No 604/2013 of the European Parliament and of the Council, establishing the criteria and mechanism determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 26 June 2013

⁴¹² Un migliore Sistema Europeo di asilo, Attualità, Parlamento Europeo, 12 Luglio 2017

⁴¹³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, COM(2011) 743 final, The Global Approach to Migration and Mobility, 18 November 2011

⁴¹⁴ Briefing, European Parliament, Reform of the Dublin System, 1 March 2019

⁴¹⁵ Ibid.

⁴¹⁶ Ibid. 378

⁴¹⁷ Ibid.

⁴¹⁸ Ibid. 380

⁴¹⁹ E. Van Trigt, The EU Migration Crisis and Moral Obligations, 2015

⁴²⁰ Un migliore Sistema Europeo di asilo, Attualità, Parlamento Europeo, 12 Luglio 2017

⁴²¹ Treaty on the Functioning of the European Union (TFEU), Chapter 2, Article 80, concerning the principle of solidarity and fair share of responsibilities among Member States that governs the implementation of policies in the EU

⁴²² Decisions (EU) 2015/1523 of the Council, 14 September 2015, establishing temporary measures in the field of international protection benefitting Italy and Greece; (EU) 2015/1601 of the Council, 22 September 2015, establishing temporary measures in the field of international protection benefitting Italy and Greece.

⁴²³ Communication of the Commission, 6 April 2016, COM(2016)197 def., reforming the common European asylum system and strengthening legal ways of access to Europe.

⁴²⁴ E. Triggiani, F. Cherubini, I. Ingravallo, E. Nalin, R. Virzo, Dialoghi con Ugo Villani I, 2017

⁴²⁵ Ibid.

⁴²⁶ Briefing, European Parliament, Reform of the Dublin System, 1 March 2019

⁴²⁷ Ibid.

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the fairness mechanism will be relocated across the EU until the number of applications falls back below 150% of the country's reference share.”⁴²⁸ However, criticism to the reform of the Dublin III in Dublin IV are various.⁴²⁹ Its emphasis on repressing secondary movement is unlikely to make protection applicants more cooperative while it rises serious human rights concerns and threatens to downgrade the standards of the Common European Asylum System (CEAS).⁴³⁰ Moreover, “instead of establishing a more fair and sustainable system, it expands the irregular entry criterion, imposing extensive “gatekeeper” responsibilities on application States and subjects them to strict deadlines for submitting take charge requests.”⁴³¹ The proposed “correction mechanism” is not designed to alleviate or compensate and it appears too cumbersome to provide relief to States confronting a crisis.⁴³² Finally, the Dublin IV adheres to the concept that applicants must not choose their destination State, failing to acknowledge schemes based on politically agreed criteria, involuntary transfer and extensive administrative procedures (heavy schemes) that are inherently incapable to achieve the goal of responsibility allocation in placing immigrants in a status determination procedure as efficiently and economically as possible.⁴³³

2.3 Principles and guidelines on the human right protection: the achievements in the framework of migratory law, from the international to the European context

A definitive solution is far to be reached. While migration can be positive and can benefit countries of origin, transit and destination, it is clear that movement which place people in precarious situations is a serious human right concern.⁴³⁴ Nowadays, the most common political discourse in Europe when coming to immigration issues, is still based on expatriations and the closing of borders. The solution cannot be found in policies aimed at keeping migrants from coming to the EU.⁴³⁵ As François Crépeau, a UN special rapporteur on the human rights of migrants sustains, “Building fences, using tear gas and other forms of violence against migrants and asylum seekers, detention, withholding access to basics such as shelter, food or water and using threatening language or hateful speech will not stop migrants from coming or trying to come to Europe.”⁴³⁶ As a matter of fact, in the opinion of the UNHCR, “EU Member States should cooperate to create a better functioning migration system and policy to ensure freedom of movement, the empowerment of migrants and

⁴²⁸ Briefing, European Parliament, Reform of the Dublin System, 1 March 2019

⁴²⁹ A small number of countries have been blocking the unanimity required to give a mandate to the Presidency to enter into negotiations with the European Parliament. As an example on 15 February 2018 the Hungarian government announced that it would propose alternative amendments to the Dublin Regulation based on a strict scrutiny and strict expulsion policy and rejection of any kind of mandatory admittance quota. (Briefing EU Legislation in Progress, Reform of the Dublin System, 1 March 2019)

⁴³⁰ F. Maiani, The Reform of the Dublin III Regulation, EP Policy Department C, PE 571.360 (2016).

⁴³¹ Ibid.

⁴³² Ibid.

⁴³³ Ibid.

⁴³⁴ Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the Situation of Migrants in Transit, A/HRC/31/35, 27 January 2016.

⁴³⁵ E. Van Trigt, The EU Migration Crisis and Moral Obligations, 2015

⁴³⁶ UN News Service, Europe's response to migrant crisis is not working, warns UN rights expert, 25 August 2015, available at: <https://www.refworld.org/docid/55e0114740c.html> [accessed 17 May 2019]

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effectively combat the smuggling of migrants.”⁴³⁷ In the light of the above, the first step suggested to regain control of borders from smugglers, is by increasing mobility solutions available to most migrants, pursuing the investment in integration measures and “developing a strong public discourse on diversity and mobility as cornerstones for contemporary European societies.”⁴³⁸ The need for official channels to access and stay in Members States is of vital importance and can be satisfied by the introduction of “smart visas allowing people to come to look for work and incentivize them to return if they don’t find the job in question.”⁴³⁹ However, to create a better regulated and controlled official labor-market, such measures must be “supported by sanctions addressed to employers who recruit, exploit and smuggle irregular migrants in underground black markets.”⁴⁴⁰ Moreover, the integration of these people in the welcoming countries and their societies has to be the first step to guarantee a respectful environment. However, in Europe the political and popular discourse has seen a “race to the bottom in the anti-migrant sentiments and use of inappropriate language which is often linked to the criminalization of immigrants.”⁴⁴¹ For this reason, European leaders have an important role in vigorously fighting racism, xenophobia and hate crimes” to further strengthen and guarantee the free movement of persons throughout the EU while establishing regulated mobility solutions at its external borders.⁴⁴² Their roles should be centered on the protection of human rights in the framework of migration in order to guarantee liberty and freedom of movement to migrants.

a. Principles and Guidelines on the Human Rights Protection of Migrants in Vulnerable Situations

This has been pursued by the Human Rights Office of the High Commissioner and the Global Migration Group, with establishment of Principles and Guidelines on the human rights protection of migrants in vulnerable situations.⁴⁴³ In the process of arriving to a welcoming country, migrants may “fall outside of the specific legal category of “refugee”, basing on the situation they left behind, the circumstances of their travel, the condition they face at their arrival and their sex, gender, age and disabilities or health issues.”⁴⁴⁴ However, the recognition that all persons, including non-nationals, have rights under international human rights law, it is important to uphold the rights of persons under international instruments.⁴⁴⁵ Moreover,

⁴³⁷ Ibid.

⁴³⁸ J.Akkash, Europe’s response to migrants crisis is not working, warns UN rights expert, 25 August 2015, retrieved from <https://news.un.org/en/story/2015/08/507202-europes-response-migrant-crisis-not-working-warns-un-rights-expert#.VehPEhHtlBc>

⁴³⁹ Ibid.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid. from the interview to François Crépeau, Migrant Crisis “Let’s not pretend Europe’s response is working”- UN rights expert warns

⁴⁴² Ibid.

⁴⁴³ UN Office of the High Commissioner for Human Rights (OHCHR), Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, February 2017, available at: <https://www.refworld.org/docid/5a2f9d2d4.html> [accessed 27 May 2019]

⁴⁴⁴ *Principles and guidelines*, OHCHR, Report on the promotion and protection of the human rights of migrants in the context of large movements, A/HRC/33/67.

⁴⁴⁵ Principle and guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, Draft, October 2017

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“refugees and asylum seekers, are entitled to specific protection under international and regional refugee law,⁴⁴⁶ together with stateless persons, trafficked persons, migrant workers and persons with disabilities.”⁴⁴⁷ The principles and guidelines, are of particular interest for this research since they present “an evolution on the topic of the protection of individual liberty and against arbitrary detention.”⁴⁴⁸ The purpose is to make targeted efforts to end unlawful or arbitrary immigration detention of immigrants and prevent in any case the detention of children because of their migration status or that of their parents.⁴⁴⁹ The guidelines expressed in principle 8⁴⁵⁰ aim at establishing a presumption against immigration detention requiring administrative and judicial bodies to presume in favor of liberty,⁴⁵¹ accompanied by “the prioritization of the implementation of non-custodial, community-based alternatives to detention that fully respect the human rights of migrants and that are based on an ethic of care rather than enforcement.”⁴⁵² Moreover, in this framework, “children should never be detained for the purpose of immigration, even for short periods, whatever their status of the status of

⁴⁴⁶ All persons who meet the refugee criteria under international refugee law are refugees for the purposes of international law, whether or not they have been formally recognized as such. See, notably, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the Convention Governing the Specific Aspects of Refugee Problems in Africa (“OAU Convention”), 10 September 1969, 1001 U.N.T.S. 45, and the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, *Ibid.* 74

⁴⁴⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, adopted by General Assembly Resolution 55/25 of 15 November 2000; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Adopted by General Assembly Resolution 45/158 of 18 December 1990; ILO, Migration for Employment Convention (Revised), 1949 (No. 97); ILO, Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143); the Convention relating to the Status of Stateless Persons, United Nations, Treaty Series, vol. 360, p. 117; and the Convention on the Rights of Persons with Disabilities, adopted by the UN General Assembly on 13 December 2006.

⁴⁴⁸ UN Office of the High Commissioner for Human Rights (OHCHR), Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, February 2017, available at: <https://www.refworld.org/docid/5a2f9d2d4.html> [accessed 27 May 2019]

⁴⁴⁹ Principle and guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, October 2017

⁴⁵⁰ *Ibid.* principle 8

⁴⁵¹ International Covenant on Civil and Political Rights, Article 9(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 16(1); Convention Relating to the Status of Refugees, Article 31(1); Human Rights Committee, General Comment No. 35 on Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, especially paras. 3 and 18. The Human Rights Committee has set out the minimum legal obligations under the ICCPR; other instruments and experts have said more clearly that immigration detention should cease. See: CMW, General Comment No. 2 on the Rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013, para. 24; CAT, Concluding observations on the fourth report of Cyprus, CAT/C/CYP/CO/4, 16 June 2014, para. 17(a); CAT, Concluding observations on the combined fourth and fifth periodic reports of Australia, CAT/C/AUS/CO/4-5, 23 December 2014, para. 16; Commission on Human Rights, Report of the Special Rapporteur - Migrant Workers, E/CN.4/2003/85, 30 December 2002, paras. 73 and 74; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, A/HRC/20/24, 2 April 2012, paras. 67 and 68; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, A/HRC/23/46, 24 April 2013, paras. 47-54; Human Rights Council, Promotion and protection of the human rights of migrants in the context of large movements: Report of the United Nations High Commissioner for Human Rights, A/HRC/33/67, 13 October 2016, para. 108(b). *Ibid.* 86

⁴⁵² CMW, Concluding observations on the initial report of Turkey, CMW/C/TUR/CO/1, 31 May 2016, para. 48(c); CAT, Concluding observations on the fourth report of Cyprus, CAT/C/CYP/CO/4, 16 June 2014, para. 17(c); CAT, Concluding observations on the combined fourth and fifth periodic reports of Australia, CAT/C/AUS/CO/4-5, 23 December 2014, para. 16; General Assembly, Protection of migrants, Resolution 63/184 adopted on 18 December 2008, A/RES/63/184, 17 March 2009, para. 9; UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), Guideline 4.3; General Assembly, New York Declaration for Refugees and Migrants, A/71/L.1, 13; Principle and guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, October 2017

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their parents.”⁴⁵³ Children “should never be detained for the purpose of keeping the family together.”⁴⁵⁴ Finally, if and only if detention is deemed necessary and respecting some conditions, defined in article 5 paragraph 1 a) - f) of the European Convention on Human Rights, “the detention conditions should respect the fundamental dignity of the person and meet minimum standards of international law” such as making sure that facilities are clearly designed for the purpose of immigration detention and the conditions reflect its administrative aim, underlining that immigrants should never be held in criminal prisons, jails or other criminal-like facilities for immigration reasons.⁴⁵⁵ The structures deemed appropriate for the stay of immigrants should be effectively monitored by independent mechanisms which have an explicit human right

⁴⁵³ Convention on the Rights of the Child, Articles 2, 3, 9, 22 and 37; CRC, General Comment No. 6 on the Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, 1 September 2005, para. 61; CRC, General Day of Discussion 2012: The Rights of All Children in the Context of International Migration, paras. 78-80; CAT, Concluding observations on the combined fourth and fifth periodic reports of Australia, CAT/C/AUS/CO/4-5, 23 December 2014, para. 16; CMW, General Comment No. 2 on the Rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013, para. 33; CMW, Concluding observations on the initial report of Turkey, CMW/C/TUR/CO/1, 31 May 2016, para. 48(b); General Assembly, New York Declaration for Refugees and Migrants, A/71/L.1, 13 September 2016, para. 56; General Assembly, Status of the Convention on the Rights of the Child: Report of the Secretary-General, A/71/413, 27 September 2016, paras. 39-40 and 62; Human Rights Council, Working Group on Arbitrary Detention, A/HRC/13/30, 18 January 2010, para. 60; Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/28/68, 5 March 2015, throughout and specifically on child migrants in paras. 59-62, 66, 67, 80-83 and 85; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, A/HRC/20/24, 2 April 2012, paras. 38-41; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants, A/HRC/29/36, 8 May 2015, paras. 44 and 112; Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the Situation of migrants in transit, A/HRC/31/35, 27 January 2015, paras. 44-45; OHCHR, “Human rights are for all, even for migrants” – Rights experts remind participants to upcoming UN Summit’, 16 September 2016, at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20518&LangID=E>; OHCHR, ‘Children and families should never be in immigration detention – UN experts’, 18 December 2016, at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21026&LangID=E>; UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), Guideline 9.2; UNHCR, Global Strategy – Beyond Detention 2014-2019 (2014), at <http://www.unhcr.org/53aa929f6.pdf>; UNHCR, UNHCR's position regarding the detention of refugee and migrant children in the migration context (2017), at <http://www.refworld.org/docid/5885c2434.html>; Principle and guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, October 2017

⁴⁵⁴ Inter-American Court of Human Rights, Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion of 19 August 2014, paras. 158 and 160; Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/28/68, 5 March 2015, throughout and specifically on child migrants at para. 80; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, A/HRC/20/24, 2 April 2012, para. 72(h); OHCHR, ‘Children and families should never be in immigration detention – UN experts’, 18 December 2016, at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21026&LangID=E>.

⁴⁵⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Articles 17.2 and 17.3; Human Rights Committee, General Comment No. 35 on Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, paras. 14 and 18; CMW, General Comment No. 2 on the Rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013, paras. 24 and 37-39; Human Rights Committee, Concluding observations on the sixth periodic report of New Zealand, CCPR/C/NZL/CO/6, 28 April 2016, para. 38(b); Commission on Human Rights, Report of the Working Group on Arbitrary Detention, Annex II, Deliberation No. 5, Situation regarding immigrants and asylum-seekers, E/CN.4/2000/4, 28 December 1999, Principle 9; Commission on Human Rights, Report of the Special Rapporteur on the human rights of migrants, E/CN.4/2003/85, 30 December 2002, paras. 17, 18, 41, 46, 53, 56, 63, 73, 75(i) and 75(n); Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, A/HRC/20/24, 2 April 2012, paras. 31 and 33-35; OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders, A/69/CRP.1, 23 July 2014, Guideline 8.9. Where facilities are operated by private contractors, States have a duty to hold them accountable for any human rights violations committed in the course of their operations. See, *UN Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011 (Ruggie Principles); Principle and guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, October 2017

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mandate, preventing and addressing any act of torture or other forms of ill-treatment and violence.⁴⁵⁶ Moreover, any restriction on movement should only be deemed legally with the purpose of maintaining public order, also guaranteeing to every immigrant the prompt access to a lawyer, enabling him/her to act if he/she find a breach in his/her own personal rights under international.⁴⁵⁷

b. The Reception Conditions Directive

Concerning the reception conditions, it has been implemented, in the context of the European Union, the Reception Conditions Directive guaranteeing to every asylum seeker waiting for a decision on their application to be provided with certain necessities to guarantee to him/her an adequate standard of living.⁴⁵⁸ The current Reception Conditions directive⁴⁵⁹ was adopted in year 2013 replacing the Council Directive 2003/9/CE⁴⁶⁰ on minimum standards for the reception of asylum seekers. The directive also provides particular attention to “vulnerable persons, especially unaccompanied minors, and victims of torture.”⁴⁶¹ The role of Member State should be, as a first and most important thing, that “within three days of the lodging of an application for international protection, the applicant is provided with a document issued in his/her own name certifying his or her status as an applicant or he/she are allowed to stay on the territory of the Member State concerned.”⁴⁶² Second, but not of inferior importance in the process, as established by Article 6 concerning the documentation,⁴⁶³ the receiving State has “to carry out the identification of special reception needs of vulnerable persons and to ensure that vulnerable asylum seekers can access medical and psychological support.”⁴⁶⁴ Moreover, the directive also includes rules regarding detention of asylum seekers with the aim of ensuring that their fundamental rights are fully respected and that they have access to employment.⁴⁶⁵ Focusing in particular on detention, as established in Article 8 of the Directive⁴⁶⁶, the role of Member States will be “avoiding to keep a person in detention for the sole reason he or she is an applicant.”⁴⁶⁷ The only occasion when Member States can actually detain an applicant, if “other less coercive alternative measures cannot be applied effectively, will be determined by a prior analysis of each case, providing an individual assessment.”⁴⁶⁸

⁴⁵⁶ Principle and guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, October 2017

⁴⁵⁷ Ibid.

⁴⁵⁸ European Commission, Migration and Home Affairs, Reception conditions, 14 May 2019

⁴⁵⁹ Directive 2013/33/EU The European Parliament and the Council, Laying down standards for the reception of applicants for international protection (recast), 26 June 2013

⁴⁶⁰ Council Directive 2003/9/EC, Laying down minimum standards for the reception of asylum seekers, 27 January 2003

⁴⁶¹ Ibid. 426

⁴⁶² Ibid. 423

⁴⁶³ Ibid. art. 6

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid.

⁴⁶⁶ Ibid. 426 art. 8

⁴⁶⁷ Ibid. 426, art.8 para. 1, in accordance with directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection

⁴⁶⁸ Directive 2013/33/EU The European Parliament and the Council, Laying down standards for the reception of applicants for international protection (recast), 26 June 2013

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It is established that an applicant can be detained, in cases where there is the need to determine his or her identity or nationality,⁴⁶⁹ in cases of absconding of the applicant,⁴⁷⁰ in order to decide the applicant's right to enter into a territory,⁴⁷¹ when he or she is detained subject to a return procedure⁴⁷² and when required by the protection of national security or public order.⁴⁷³ Since ground for detention shall be laid down in national law,⁴⁷⁴ the role of Member States will be that of ensuring that "the rules concerning alternatives to detention are respected at the national level."⁴⁷⁵ Laid down in the Directive, are also the guarantees for detained applicants,⁴⁷⁶ the conditions of detention⁴⁷⁷ and the rules concerning the detention of vulnerable persons and of applicants with special reception needs.⁴⁷⁸

However, it has to be said that the current Reception Conditions directive "still leaves to States a considerable degree of discretion to define what constitutes an adequate standard of living and how it should be achieved."⁴⁷⁹ As a matter of facts, the reception conditions continues to vary considerably between EU States both in terms and in standards on how the reception system should work.⁴⁸⁰ The step forward was proposed by the Commission in 2016, presenting a revision of the Reception Conditions Directive in order to harmonize reception conditions throughout the Union and to reduce the incentives of secondary movement increasing applicants' self-reliance and integration prospects by reducing the time-limit for access to the labor market.⁴⁸¹

c. The EASO Guidance on Reception and Conditions

On the same line is the EASO Guidance on Reception Conditions of 2016.⁴⁸² The guidance has been developed after the European Agenda on Migration⁴⁸³ underlined "the importance of a clear system for the reception of applicants for international protection as part of a strong common European asylum policy, referring to the need for further guidance to improve the standards on reception conditions across the EU."⁴⁸⁴ The documents has been drafted by a group of EU's Member States experts and representatives of "relevant

⁴⁶⁹ Ibid. art 8 para 3 a)

⁴⁷⁰ Ibid. b)

⁴⁷¹ Ibid. c)

⁴⁷² Ibid. d)

⁴⁷³ Ibid. e)

⁴⁷⁴ Ibid. 105

⁴⁷⁵ Ibid. art 8 para 4

⁴⁷⁶ Ibid. art 9

⁴⁷⁷ Ibid. art 10

⁴⁷⁸ Ibid. art 11

⁴⁷⁹ European Commission, Migration and Home Affairs, Reception conditions, 14 May 2019

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid.

⁴⁸² European Asylum Support Office, EASO guidance on reception conditions: operational standards and indicators, September 2016

⁴⁸³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European Agenda On Migration', COM(2015) 240, 13 May 2015.

⁴⁸⁴ European Asylum Support Office, EASO guidance on reception conditions: operational standards and indicators, September 2016

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stakeholders in the field of reception and fundamental rights.”⁴⁸⁵ The guidance defines specific common standards which are applicable to national reception systems and “the indicators with which such standards should be measured against.”⁴⁸⁶ The main purposes of the guidance are recognized as “serving as a tool to support a reform or development and as a framework for setting further development of reception standards” and be used by reception authorities to support the planning/running of reception facilities and support staff training.⁴⁸⁷

3. The future of migration and asylum law

Despite the decreasing in the arrivals to pre-2015 levels,⁴⁸⁸ the topic of how to regulate migratory fluxes in the European context remains a number one topic on the agenda of European leaders and policy makers. Hardline approaches dominated the political sphere of many countries and created “disagreements blocking agreements on reforms of EU asylum laws and fair distribution of responsibility for processing migrants and asylum seekers entering and already present in EU territory.”⁴⁸⁹ Furthermore, the focus remained on keeping migrants and asylum seekers away from EU, including through “problematic proposals for processing migration cooperation with non-EU countries with fewer resources and uneven human rights record.”⁴⁹⁰ EU developed and promoted its partnership on migration control with Libya, even though the country displayed “brutality against migrants and asylum seekers causing a skyrocketing increasing in number of deaths among migrants.”⁴⁹¹ The UNHCR too emphasized that Libya is not a safe place to disembark rescued persons.⁴⁹² Moreover, in June 2018, Italy, an important country in the welcoming and allocation of migrant, began to refuse or delaying disembarkation of rescued persons from NGO, commercial and military ships.⁴⁹³ As a reaction to this decision, European leaders did not try to seek “a regional disembarkation agreement to ensure a fair and predictable system; they instead focused on creating disembarkation platforms outside the EU where all rescued persons would be taken for processing of asylum claims.”⁴⁹⁴

⁴⁸⁵ Such as the European Commission, the European Union Agency for Fundamental Rights (FRA) and the United Nations High Commissioner for Refugees (UNHCR)

⁴⁸⁶ European Commission, Migration and Home Affairs, Reception conditions, 14 May 2019

⁴⁸⁷ Ibid. 451

⁴⁸⁸ Human Rights Watch, European Union, Events 2018, 2018, link: <https://www.hrw.org/world-report/2019/country-chapters/european-union>

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

⁴⁹² Ibid.

⁴⁹³ Ibid.

⁴⁹⁴ Ibid.

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When coming to the topic of detention, nowadays still 12 EU countries⁴⁹⁵ detain migrants who arrive irregularly.⁴⁹⁶ However, since 2013 Directive⁴⁹⁷, the most widespread use of detention has been asylum seekers on the way out – also called the Dublin transfers – and the return of filed applicants.⁴⁹⁸ the most sensitive victims are still children: in countries such as France, Bulgaria, Greece and Hungary immigrant children are frequently detained.⁴⁹⁹ A few countries, including Netherlands and Sweden, forbid detention of asylum- seekers children, whether in families or unaccompanied while in some countries such as Bulgaria, Greece and Hungary, despite detention of unaccompanied children is forbidden by law, in practice it continues to happen.⁵⁰⁰ In addition, even if the detention of other vulnerable migrants, such as those who are sick or survivors of torture is forbidden, it does not happen in practice: a recent survey of detainees in seven deportation center in the UK found that more than half were “at risk”.⁵⁰¹

4. Final remarks

The migratory crisis afflicting Europe in the first decade of the years 2000s, brought about the consciousness that more had to be done in dealing what was considered one of the most terrible humanitarian crises of the century, so far. 20000 migrants died in the process of crossing the Mediterranean Sea, escaping from their countries, afflicted by wars, hunger and misery.⁵⁰² It was the condition from which Khlaifia and other⁵⁰³ Tunisian citizens fled their country in year 2011, during the worst outburst of the Arab spring. Their crossing, on board of rudimentary vessels heading to the Italian coast, was the beginning of their experience of breach of their human rights. From the beginning of their arrival, they were held in a status like prisoners in an Early Reception and Aid Center in Lampedusa, that was “overcrowded and dirty and permanently under police surveillance.”⁵⁰⁴ Moreover, the Tunisian nationals in the case, were “not able to get information about their conditions and to have contacts with the outside world.”⁵⁰⁵ The escalation in their treatment happened when, after they tried to escape from the bad conditions of the center in Lampedusa, they were captured and flown to Palermo, held in same and even worse conditions than in the CSPA, and finally repatriated to Tunisia under a secret agreement between Italy and the country.⁵⁰⁶ After various denounces from human rights groups

⁴⁹⁵ 12 countries: Belgium, Bulgaria, Estonia, Finland, Greece, Hungary, Luxemburg, Malta, The Netherlands, Slovenia, Spain, The United Kingdom

⁴⁹⁶ According to Marie Walter-Franke, a Jacques Delors Institute Policy Fellow and specialist on EU migration and asylum policy

⁴⁹⁷ Directive 2013/33/EU The European Parliament and the Council, Laying down standards for the reception of applicants for international protection (recast), 26 June 2013

⁴⁹⁸ M. MacGregor, Under Lock and Key: Asylum Seekers in Detention, Info Migrants, 4 December 2018, link: <https://www.infomigrants.net/en/post/13572/under-lock-and-key-asylum-seekers-in-detention>

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid.

⁵⁰² International Organization for Migration (IOM), Fatal Journeys, Tracking Lives Lost during Migration, 2014

⁵⁰³ Grand Chamber, case of *Khlaifia and others v. Italy*, application no. 16483/12, 15 December 2016

⁵⁰⁴ Ibid.

⁵⁰⁵ Ibid.

⁵⁰⁶ Secret agreement between Italy and Tunisia regarding the repatriation of Tunisian migrants signed in 2011

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Khlaifia and others decided to apply presenting allegations against the country for the bad treatment they received while trying to enter the State. Under EU law they were found victims of the breach of Article 5 of the ECHR⁵⁰⁷ protecting the right to security and liberty, guaranteeing to this sentence to be remembered, in an infamous way, as the first conviction for unlawful detention of migrants in centers for Early Reception and Aid in Italy.⁵⁰⁸ The conviction is of primary importance since it placed into discussion the detention practices carried out in the hotspots⁵⁰⁹ underlining the lack of a normative base regulating detention in CSPAs.⁵¹⁰

After the final sentence of this case and since the beginning of major difficulties in southern European countries in dealing with the migratory crisis due to their lack of sufficient means to deal with it, many efforts have been done at the international level. A global approach to migration was proposed and adopted to ameliorate the relations between EU Member States and non-EU States. The strategic way of this approach is based on the benefit that migration can give to countries and their internal and external dialogues with other nations, promoting the weakening of human trafficking and illegal immigration. Moreover, with the revision and modification of the Dublin Regulation,⁵¹¹ border Member States such as Italy and Greece were alleviated from the massive flux of immigration with improved redistribution of migrants in situations of emergency.⁵¹² The system was an example of the promotion of fairness and collaboration among EU Member States. In addition, the establishment of principles and regulations concerning the human right protection of migrants in vulnerable situations,⁵¹³ guaranteed a step forward in preventing the illegal detention of immigrants and immigrant children and their unlawful deprivation of liberty and freedom of movement. On this purpose, also the Reception Condition Directive⁵¹⁴ has the role of guaranteeing the proper conditions of living to immigrants coming to a Member State, while waiting for the decision on their state. Finally, the EASO⁵¹⁵ underlines the need for a clear system for the reception of applicants of asylum being recognized as a tool to support a reform or development of reception standard used by reception authorities in every EU Member-State.

However, unless all these steps forward from the legal point of view, informal practices promoting unlawful detention are still performed in hotspots in order to simplify the identification and fingerprinting of

⁵⁰⁷ European Convention on Human Rights, art 5

⁵⁰⁸ Associazione sugli studi giuridici sull'immigrazione ASGI, *Detenzione in centri d'accoglienza, un commento sulla sentenza Khlaifia vs Italia*, 21 February 2017, link: <https://www.asgi.it/allontamento-espulsione/detenzione-centro-accoglienza-sentenza-khlaifia-italia/>

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid.

⁵¹¹ The Dublin Regulation, or Dublin III Regulation, establishing the criteria and mechanism for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Regulation No. 604/2013, 26 June 2013

⁵¹² Emergency classified as when asylum requests in a country is above 150%

⁵¹³ Principle and guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, October 2017

⁵¹⁴ Directive 2013/33/EU The European Parliament and the Council, Laying down standards for the reception of applicants for international protection (recast), 26 June 2013

⁵¹⁵ European Asylum Support Office, EASO guidance on reception conditions: operational standards and indicators, September 2016

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immigrants.⁵¹⁶ The situation, denounced in an Amnesty International report on illegal detention in Italian Hotspots,⁵¹⁷ more specifically in paragraph 3.2.2, notwithstanding the absence of a legal basis, the employment of detention as an informal practice with no pre-emptive formal order is still practiced in hotspots.⁵¹⁸ The victim is not guaranteed with the validation of the order by a judge and is left in a condition of not being able to appeal to a tribunal to decide in short time the lawfulness of the detention.⁵¹⁹ The continuous breach of human rights, even if formally punished at the international level, fails to effectively sentence the perpetrators of these breach and act in a pre-emptive fashion to avoid further suffering. What is necessary and fundamental in these present and in future scenarios is monitoring the activities of states in the process of welcoming and in the first steps of the registration. These actions will have the aim of “guaranteeing an evaluation regarding the respect of respectful praxis and the denounce of illegal ones.”⁵²⁰ Of major importance will also be the jurisdictional intervention, in an urgent way, of the European Court of Human Rights when violations of the ECHR arise.⁵²¹ The “proper, stricter and immediate enforcement of human rights is a right that has to be guaranteed to every human being as such and, with a better functioning welcoming system, extremely dangerous and depleting praxis will not be perpetrated anymore.”⁵²² European leaders forming the most important European decisional bodies, have the duty to work on the guarantee of every person’s rights, in a climate of cooperation between States. Immigration cannot be stopped but everyone can benefit from it, for a better international environment and peace between States.

⁵¹⁶ Associazione sugli studi giuridici sull’immigrazione ASGI, Detenzione in centri d’accoglienza, un commento sulla sentenza *Khlaifia vs Italia*, 21 February 2017, link: <https://www.asgi.it/allontamento-espulsione/detenzione-centro-accoglienza-sentenza-khlaifia-italia/>

⁵¹⁷ Amnesty International Report, Hotspot Italia, Come le Politiche dell’Unione Europea Portano a Violazioni dei Diritti Umani di Rifugiati e Migranti, 2016

⁵¹⁸ Ibid. 151

⁵¹⁹ Amnesty International Report, Hotspot Italia, Come le Politiche dell’Unione Europea Portano a Violazioni dei Diritti Umani di Rifugiati e Migranti, 2016

⁵²⁰ Ibid.

⁵²¹ Ibid.

⁵²² Ibid.

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Sintesi dell'elaborato in lingua italiana

Un importante primo passo per la comprensione del contesto legale della ricerca è l'introduzione alla Convenzione Europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali (CEDU). Elaborata nel 1950 dal Consiglio d'Europa, un'organizzazione internazionale formatasi nel tentativo di unificazione Europea nel post-guerra, entra in forza il 3 settembre 1953, con l'obiettivo di proteggere i diritti umani e le libertà in Europa. Questa convenzione stabilì inoltre la Corte Europea dei Diritti dell'Uomo che, fondata nel 1959, garantisce l'accesso a mezzi legali a ogni individuo o Stato che vede violati i propri diritti.

Di interesse particolare è l'articolo 5 della suddetta convenzione, riguardante il diritto alla libertà e alla sicurezza. Questo articolo si presenta in 5 paragrafi: il primo paragrafo espone i principi generali, seguiti da una lista di eccezioni in cui la privazione della libertà può essere considerata legale. I paragrafi 2,3 e 4 sono di natura procedurale e specificano i requisiti in termini di arresto, detenzione e modalità per la verifica e contestazione di legittimità. Più nel dettaglio, l'articolo 5(1) si riferisce a tutte persone che, come esseri umani, beneficiano del diritto alla libertà e sicurezza. Questo diritto è considerato fisico, dal momento in cui nessuno può essere privato della sua libertà in maniera arbitraria ma solamente seguendo una procedura prescritta dalla legge. Tuttavia, la privazione della libertà può essere considerata conforme alla legge nazionale ma essere arbitraria alla CEDU. A stabilire la presenza di una privazione della libertà è la Corte Europea dei Diritti dell'Uomo che deve considerare ogni caso singolarmente secondo vari criteri quali la durata, il tipo, gli effetti e le modalità di attuazione di ogni misura in questione. L'articolo 5(1)(A) si definisce come eccezione al diritto di libertà e stabilisce il principio per il quale un individuo può essere detenuto solamente dopo una condanna emanata da una corte competente. Il seguente sotto-paragrafo 5(1)(B) determina la legittimità della detenzione a seguito all'inadempienza a un ordine della corte o a un'obbligazione legale, come il mancato pagamento di multa, il rifiuto di sottoporsi a un esame psichiatrico, etc. Il sotto-paragrafo 1(C) determina l'arresto e la detenzione di un sospettato per garantire l'amministrazione della giustizia penale con la specifica che chiunque venga detenuto sotto questo paragrafo debba essere prontamente portato davanti a un'autorità giudiziaria e gli venga garantito un processo in un tempo ragionevole. L'articolo 5(1)(D) permette la detenzione di minori, ovvero chiunque sotto l'età di 18 anni, per lo scopo di supervisione educativa o per portare il minore davanti alla corte competente. Il seguente sotto-paragrafo (E) stabilisce la legittimità della detenzione di un individuo per un fattore di prevenzione nella diffusione di una malattia infettiva, la detenzione di un individuo alienato, di un alcolizzato, di un tossicomane o di un vagabondo. Le categorie di persone presenti in questo sotto-paragrafo possono essere private della loro libertà per poter avere accessi a trattamenti medici o per considerazioni dettate da politiche sociali o entrambe. La detenzione per prevenire l'ingresso o per l'espulsione e deportazione è stabilita nell'articolo 5(1)(F). Questo sotto-paragrafo permette a uno Stato l'arresto e la detenzione di un individuo in un contesto di migrazione. In alcuni casi la Corte chiede di sospendere il verdetto per poter giudicare la situazione in modo da prevenire un danno irreversibile all'individuo. Arrivando all'articolo 5(2), dal carattere prettamente procedurale, si evince la necessità di fornire informazioni riguardo

l'arresto alla persona direttamente interessata. Queste informazioni devono essere fornite prontamente nella lingua della persona in esame mostrandogli le ragioni dell'arresto e di ogni accusa nei suoi confronti. Se questo procedimento non viene rispettato, l'arresto e la detenzione saranno considerate illecite, anche se possono essere individuate come un'eccezione all'illegalità della detenzione come uno dei casi presentati nei sottoparagrafi dell'articolo 5(1)(A)-(F). Della stessa natura procedurale è l'articolo 5(3) che sottolinea il diritto di ogni individuo ad essere portato prontamente a giudizio davanti a un giudice o un ufficiale autorizzato a esercitare il potere giuridico. Questo articolo fa da garante contro ogni privazione ingiustificata della libertà di un soggetto, promuovendo inoltre una salvaguardia contro il rischio di maltrattamenti e contro abusi di potere da parte di autorità o ufficiali. Il seguente paragrafo, (4) può essere definito come *l'Habeas Corpus* dell'articolo 5. Ciò che viene garantito sotto questo paragrafo si estende a tutti i casi di privazione lecita di libertà elencati nell'articolo 5(1). In questo contesto viene infatti stabilita la possibilità di contestare la legalità della detenzione. Il ruolo della Corte è quello di stabilire se ci sono abbastanza prove che stabiliscano che l'individuo sotto esame ha realmente commesso un reato. In conclusione, l'ultimo paragrafo dell'articolo 5 CEDU stabilisce il diritto a una compensazione a fronte di una detenzione illecita. Chiunque sia stato vittima di una detenzione illecita ha infatti il diritto di richiedere una compensazione, solamente dove ci siano danni pecuniari o non-pecuniari da risolvere.

Dopo questa analisi dettagliata del testo dell'articolo 5 della CEDU, è necessario specificare che questo rimane soggetto a un considerevole numero di giurisprudenza a causa del suo fraseggio talvolta confuso che ha portato alcuni paesi ad esprimere riserve. In particolare, gli articoli 5(1)(C) e (3), essendo redatti in modo imperfetto, sono difficili da applicare in maniera uniforme a tutti i diversi sistemi di diritto civile o comune. Per questo, questa ricerca si incentra sull'analisi del caso *Khlaifia e altri c. Italia*, concernente la violazione dell'articolo 5 della CEDU.

Prima di entrare nei dettagli del caso, è di dovere fornire un contesto geopolitico alla ricerca. Nell'ultima decade degli anni 2000, l'Europa ha affrontato una delle sfide più grandi nella sua storia, ovvero l'immigrazione, un fenomeno che rappresenta le ineguaglianze tra il nord e il sud del mondo. Questa ondata di più di un milione di persone provenienti dai paesi dell'Africa del nord, emigrarono verso il continente europeo spinti dal terrore della primavera araba e della guerra in Siria. Il picco di questo fenomeno venne registrato negli anni 2015-2016. La maggior parte di queste persone, fuggivano in Europa alla ricerca di protezione politica internazionale e religiosa, come avvenne nel caso di Mr *Khlaifia* e altri suoi connazionali tunisini. Affrontando una traversata in mare, con un mezzo di fortuna, vennero intercettati dalla guardia costiera italiana e portati a un Centro di Soccorso e Prima Accoglienza (CSPA) a Lampedusa dove vennero trattenuti illegalmente in condizioni inumane: il centro era sovraffollato, con scarsa igiene, spazio inadeguato dove poter dormire e nessun contatto con il mondo estero a causa di una costante sorveglianza della polizia. A seguito di una violenta rivolta dei migranti, il centro venne parzialmente distrutto e i richiedenti vennero trasferiti in un palazzetto dello sport dove riuscirono a fuggire per prendere parte a una manifestazione nel paese di Lampedusa. Vennero individuati, arrestati e trasferiti su due navi ormeggiate nel porto di Palermo,

dove vennero confinati a un'area sovraffollata, con accesso limitato ai servizi, senza informazioni e talvolta maltrattati e insultati dagli ufficiali della polizia. Dopo alcuni giorni, vennero portati all'aeroporto di Palermo, dove vennero ricevuti dal console tunisino che, sulla linea di un accordo segreto tra Italia e Tunisia del 2011, deportò Khlaifia e gli altri connazionali in Tunisia. Il testo dell'accordo rimase segreto, non accessibile né ai migranti né al pubblico. Al loro arrivo all'aeroporto di Tunisi i richiedenti furono infine rilasciati.

Dal punto di vista legislativo, la vicenda può essere affrontata a livello internazionale, comunitario e nazionale. A livello internazionale, un esempio importante può essere considerata la Risoluzione di Dicembre 2014 dell'Assemblea Generale delle Nazioni Unite nella quale viene riconosciuto il diritto di ogni paese al provvedimento di espulsione di migranti dal proprio territorio nazionale nei principi del rispetto del diritto internazionale, del diritto umanitario e del principio generale di legalità, punendo le espulsioni collettive. Inoltre, le privazioni di libertà che vanno oltre a un periodo limitato di tempo e non sono praticate per esigenze collegate all'espulsione sono anch'esse illegali. A livello comunitario, di particolare interesse è la Direttiva 2008/115/CE del 16 dicembre 2008 presentante le norme e procedure applicabili negli Stati Membri in caso di rimpatrio di cittadini stranieri che non posseggono un permesso di soggiorno regolare. Questa direttiva garantisce agli stati la libertà di garantire agli immigrati periodi di ritorno volontari, dopo i quali sia possibile procedere con l'espulsione, sempre seguendo il principio di razionalità e proporzionalità. Riguardo la detenzione, la direttiva conferma che essa debba essere usata solo come mezzo ultimo nel rispetto di requisiti formali come la necessità di una disposizione scritta e motivata dalle autorità. A livello nazionale, la legge italiana presenta la legge Bossi-Fini, d.lgs. 286/98 che specifica che il questore può disporre un ordine di rimozione di tutti gli individui che arrivano nel paese in maniera illecita, specificando la possibilità di trattenere queste persone nel centro di identificazione ed espulsione più vicino.

Riguardo i fatti legali legati alla vicenda, il caso ha catturato subito l'attenzione di alcuni gruppi e associazioni anti-razziste che hanno presentato denuncia e spronato procedimenti penali contro gli ufficiali di Palermo riguardo il trattamento ricevuto dai migranti sulle barche. Il giudice istruttorio sottolineò nella sua argomentazione che l'obiettivo di trasferire i migranti in un CSPA è di soddisfare e assistere i loro bisogni igienici prima di trasferirli in un Centro di Identificazione ed Espulsione (CIE). Tuttavia, il giudice condivise la teoria del pubblico ministero (public prosecutor) per la quale la durata e il confinamento in CSPA fosse talvolta vaga e la questura di Agrigento avesse soltanto registrato la presenza dei migranti nel centro senza prendere nessuna decisione riguardo il loro confinamento. In questo caso, il giudice di Agrigento, tenne in considerazione la situazione di emergenza nella quale il paese verteva al momento, sottolineando che un "tempo ragionevole" doveva tenere in considerazione le difficoltà tecniche e logistiche legate all'elevato numero di migranti presenti nel centro. Inoltre, importante attenzione venne riservata anche alle condizioni di salute dei migranti sulle navi che vennero identificate buone, a seguito di alcune verifiche sul luogo. Le accuse di detenzione e sorveglianza vennero scartate appellandosi all'articolo 54 del Codice Penale Italiano, che stabilisce lo "stato di necessità", giustificando la condotta degli ufficiali di polizia in ogni evenienza. Nel frattempo, due altri migranti, vittime di ordini di respingimento, contestarono questi ordini al giudice di pace

di Agrigento che li annullò a causa di una mancanza del rispetto di tempi ragionevoli dopo l'identificazione dei richiedenti come immigrati irregolari. Infatti, ogni restrizione della libertà personale di un individuo in assenza di una decisione motivata dell'autorità costituisce una violazione dell'articolo 13 della Costituzione Italiana che protegge l'inviolabilità della libertà personale. Solo in circostanze eccezionali e in condizioni di necessità e urgenza definite dalla legge, la polizia può adottare misure provvisorie che dovranno essere riferite entro 48 ore all'autorità giudiziaria e, se non approvate entro le seguenti 48 ore, dovranno essere scartate e considerate inefficaci. Il 6 Marzo 2012 la commissione speciale per i diritti dell'uomo del Senato italiano intervenne approvando un report "sullo stato di [rispetto dei] diritti umani nelle prigioni e nei centri di detenzione in Italia" descrivendo le azioni del centro CSPA di Lampedusa come prolungando la permanenza di migranti oltre a venti giorni senza nessuna decisione formale concernente lo stato legale della persona trattenuta. Questo stato di prolungata detenzione portò a crescenti tensioni e a casi di autolesionismo causati dalle scarse condizioni del centro in questione. In seguito, il caso fu portato alla Corte Europea dei Diritti dell'Uomo, in linea con l'articolo 34 della CEDU, il 9 Marzo 2012. Nella causa i cittadini tunisini, asserirono di essere stati confinati in un centro di ricezione per immigrati irregolari e di essere stati soggetti a espulsioni collettive. Inoltre, nel contesto della legge italiana, confermarono di non avere accesso a un ricorso effettivo al quale far presente la violazione dei loro diritti fondamentali. Il primo settembre 2015, la Camera Grande emanò una sentenza dichiarando a maggioranza la richiesta come parzialmente ammissibile, confermando all'unanimità la violazione dell'articolo 5 §§ 1, 2, 4 della CEDU. La Camera Grande affermò la violazione dell'articolo 5 da parte dell'Italia dal momento in cui i migranti non possono essere detenuti in alloggi di emergenza senza una chiara base legale. Inoltre, la Corte, basandosi sulle considerazioni del Giudice di Pace di Agrigento e del Senato Italiano, individuò le condizioni alle quali i migranti erano soggetti, come sufficienti per essere considerate detenzione. Inoltre, aggiunse che, anche se il CSPA non era considerato un centro di detenzione dalla legge nazionale, le condizioni al suo interno erano considerate come tali. Come prima cosa la corte supportò il fatto che i richiedenti non godessero del diritto fondamentale di habeas corpus, essendo impossibilitati a contestare la loro detenzione, ammontando così a una violazione dell'articolo 5(1) CEDU. In aggiunta, l'accordo segreto stabilito tra Italia e Tunisia non poteva provvedere alcuna base per la detenzione dal momento in cui non era accessibile ai richiedenti. Di conseguenza, senza basi legali per la detenzione, l'Italia non avrebbe potuto informare i richiedenti delle ragioni concernenti la deprivatione della loro libertà, incorrendo nella violazione dell'articolo 5(2) CEDU. In conclusione, la Corte evidenziò la mancanza da parte del sistema legale italiano di fornire ai richiedenti un rimedio tramite il quale potessero contestare la legittimità della loro detenzione, violando infine l'articolo 5(4) CEDU. In seguito alla sentenza, l'articolo 41 CEDU concernente la equa soddisfazione venne applicato alle parti danneggiate con un compenso in denaro volto a alleviare i danni non pecuniari e pecuniari incorsi nel processo.

Dopo la conclusione del processo, il giudizio derivante dal caso *Khlaifia e altri c. Italia* e le sue conseguenze, devono essere analizzate sotto due punti di vista differenti: il punto di vista legale e il punto di vista umanitario. Il caso, bensì concluso, costituisce ancora oggi un grande spunto dal momento in cui gli Stati

Membri si trovano ancora coinvolti nella protezione internazionale e all'accoglienza di migranti. In questo conteso, in riferimento all'articolo 5 CEDU, il giudizio rappresenta un maggiore avanzamento nella protezione dei diritti di quelle persone che ancora oggi, attraversano i confini Europei senza documenti validi. Per l'Italia ed altri Stati, la sentenza nel caso *Khlaifia* consiste in un risultato misto dal momento in cui alcuni Stati dovranno modificare le leggi concernenti i diritti procedurali dei migranti in modo da evitare conflitti tra la legge dello Stato e le politiche dell'Unione Europea. Mentre il caso era ancora pendente l'uso di hotspots in paesi come la Grecia e l'Italia continuò. L'Unione Europea ha infatti stabilito che ci sia la necessità di una collaborazione tra le aree di frontiera dove, esperti nazionali, sotto il coordinamento di agenzie specifiche assistano l'amministrazione nazionale. Tuttavia, questo approccio potrebbe portare a una maggiore libertà d'azione degli Stati nel gestire influssi di massa di migranti. Quando gli Stati affrontano grandi flussi migratori, possono rimanere sprovvisti di risorse che permettano di provvedere alloggi appena ce ne sia la necessità. Inoltre, la conclusione della sentenza, permetta agli stati la possibilità di espellere i migranti senza condurre selezioni individuali delle richieste di asilo. La decisione della Corte in merito al caso *Khlaifia*, non pone nessuna obbligazione sugli Stati a informare i migranti dei diritti di non respingimento e altre protezioni internazionali.

Anche dal punto di vista umanitario il caso ha portato a risultati misti. La sentenza stabilisce che lo scopo dell'articolo 5 è più ampio, richiedendo esplicitamente agli Stati di applicare leggi nazionali trasparenti e specifiche, garantendo ai migranti e ai non cittadini l'accesso a basi legali per contestare le condizioni della loro detenzione. Inoltre, la Corte non ha mancato l'opportunità di rimarcare che il divieto della privazione della libertà nell'articolo 5 non può essere eroso, anche se un paese si trova ad affrontare un contesto estremo di crisi migratoria. Con il perpetrarsi del fenomeno migratorio in Europa, non rimane che analizzare l'influenza del caso *Khlaifia* sul comportamento degli Stati. Nonostante esso abbia garantito migliori diritti procedurali ai migranti, denunce di pratiche di detenzione arbitraria nel contesto degli hotspot sono state registrate nell'anno 2016. Difatti, se gli Stati Membri continuano a considerare la privazione della libertà come mezzo necessario per contrastare l'immigrazione illegale, devono adottare leggi che governino con chiarezza i requisiti sostantivi e le garanzie procedurali con particolare attenzione al diritto di *habeas corpus*. Tuttavia, con lo scopo di garantire agli Stati di mantenere i livelli prescritti dalla Convenzione, in tempi di crisi, devono contare sulla solidarietà di altri Stati Membri che dovrebbero condividere gli oneri e le risorse. Questa solidarietà dovrebbe infatti prevenire gli Stati più soggetti a una straordinaria pressione migratoria a non incorrere in condanne. D'altro canto, nonostante il caso *Khlaifia*, il Comitato dei Ministri del Consiglio d'Europa, nella decisione del 15 marzo 2018, urge l'Italia ad adottare effettive misure generali nel contesto del sistema di recezione dei migranti. Quello che il Comitato sottolineò fu la mancanza di accessibilità ai rimedi legali dinanzi alle autorità nazionali nei casi di privazione della libertà dei migranti collocati in centri di detenzione. Il Comitato richiese allo stato di dimostrare in maniera chiara e precisa l'attuale permanenza dei migranti nei centri di primo aiuto ed assistenza, prima e dopo l'identificazione. Infine, invitarono l'Ombudsman nazionale per i diritti delle persone private della loro libertà, a chiarificare i poteri delle autorità in indirizzare le denunce e provvedere

esempi di misure adottate a riguardo. I problemi giuridici derivanti dal giudizio *Khlaifia e altri c. Italia* e la conseguente violazione dei diritti umani, evidenzia il contesto post nazionale della globalizzazione. Durante il periodo della crisi migratoria in Europa, i paesi si trovarono obbligati a proteggere i diritti umani e adempiere ai loro doveri internazionali, sperando nel frattempo di mantenere la loro autonomia nell'implementazione di quelle disposizioni, applicando in maniera flessibile le leggi stabilite dalla CEDU e dalla Corte Europea dei Diritti dell'Uomo. È in questo contesto che emerge la questione del pluralismo tra gli ordini nazionali e la normativa cosmopolita che deriva dalla Corte. Difatti, la decisione analizzata in questa ricerca, è la dimostrazione della comparsa di un diritto cosmopolita o globale. Come dimostrazione, la possibilità di un individuo di denunciare uno Stato per una violazione della CEDU – superando quindi l'idea che il diritto pubblico internazionale sia una mera legge tra Stati – rende possibile dimostrare che le leggi fornite nella CEDU proteggono gli individui da violazioni dei diritti umani che si verificano entro i confini di uno Stato o di una comunità politica. Tuttavia, una legge cosmopolita è ancora un luogo di dibattito e divergenze che rende la struttura cosmopolita una sfida che coinvolge l'ordine nazionale: nell'interazione tra diritto cosmopolita e lo Stato sovrano nazionale, limiti e regole sono imposte e queste impediscono di proteggere i diritti e le posizioni legali degli immigrati.

Sono state proposte, nel corso degli anni successivi al caso *Khlaifia*, alcune soluzioni e possibili scenari per conciliare gli ordini nazionali e internazionali e garantire la salvaguardia dei diritti delle persone coinvolte nelle migrazioni. L'Approccio Globale in materia di Migrazione e Mobilità, rappresenta un bisogno primario per l'Unione, con l'obiettivo di massimizzare l'impatto della migrazione sullo sviluppo degli stati partner limitandone le conseguenze negative. Questo Approccio stabilisce una maniera più strategica e efficiente di conciliare le politiche dell'Unione e le altre politiche esterne e interne. Inoltre, si propone di stabilire un dialogo e cooperazione coinvolgendo Stati non membri dell'Unione, promuovendo educazione e formazione, scambi culturali, commercio e business. Questi benefici verranno offerti a paesi confinanti con l'Unione Europea, alla Tunisia, Marocco e l'Egitto, garantendo la facilitazione del rilascio dei visti e degli accordi di riammissione. Tra i principali obiettivi dell'Approccio, particolare attenzione è riservata alla prevenzione e riduzione dell'immigrazione irregolare e del traffico di esseri umani. Ciò nonostante, scetticismi arrivano da alcuni Stati Membri che vorrebbero mantenere la sovranità completa sulle decisioni riguardanti il numero di migranti sul loro territorio e il loro paese di provenienza. Infatti, alcuni Paesi ritengono che le questioni migratorie siano un'area di giurisdizione nazionale. Inoltre, la cooperazione non è negli interessi di Paesi terzi in quanto gli incentivi offerti dall'UE rimangono meri strumenti per legittimare una strategia che rimane EU- centrica.

Un altro passo avanti nella giurisprudenza dell'Unione è stata la revisione delle Convenzione di Dublino. Questa convenzione garantisce agli Stati Membri di deportare i migranti nel primo paese di arrivo nell'Unione anche se i migranti stessi non vorrebbero rimanere in quel paese. La prima versione della Convenzione, stabilita nel 2003 aveva come scopo l'assegnazione della responsabilità del trattamento di una richiesta d'asilo a un singolo Stato Membro. Come conseguenza, quando il numero di migranti cominciò ad aumentare durante

la crisi migratoria, i paesi di confine come l'Italia e la Grecia, iniziarono a soccombere sotto il peso delle innumerevoli richieste d'asilo. Per questo motivo, la Convenzione di Dublino venne vista come una minaccia alla ripartizione equa dei migranti e alla libertà di movimento nella zona Schengen. Dal 2009 il Parlamento invoca una totale revisione della Convenzione che avvenne nel 2015 con la Convenzione Dublino IV. Questa si propose di fare fronte alle crisi migratorie attraverso un "meccanismo di assegnazione correttiva" in caso uno Stato riceva un numero sproporzionato di richieste di asilo. Questa sproporzionalità è raggiunta quando uno Stato Membro riceve un numero di richieste superiore del 150% alla quota di riferimento. I nuovi arrivati, dovranno essere riassegnati negli altri paesi membri finchè la quota non torni ad essere inferiore al 150%. Tuttavia, questo metodo non promuove la cooperazione per proteggere i migranti, evidenziando una seria preoccupazione per il rispetto dei diritti umani; infatti, questo metodo aumenta gli sbarchi irregolari e mette pressione sui paesi confinanti forzandoli a rispettare scadenze severe. Inoltre, Dublino IV aderisce al concetto che i migranti non possano scegliere il loro Stato di destinazione, dando vita a procedure che sono inerentemente incapaci di raggiungere gli obiettivi di responsabilità nell'assegnazione dei migranti in maniera economica ed efficace.

Una soluzione definitiva è ancora lontana. Mentre l'immigrazione può essere positiva e beneficiare i paesi di origine, transito e destinazione, è chiaro che il movimento che stabilisce le persone in una situazione precaria è un pericolo per la tutela dei diritti umani. Oggigiorno, il discorso politico più comune in Europa è ancora basato su espatri e la chiusura dei confini. Tuttavia, la soluzione non è da trovarsi in politiche volte a prevenire l'immigrazione in Europa. Il primo passo per riguadagnare il controllo delle frontiere dai trafficanti è aumentare le soluzioni di mobilità e renderle disponibili ai migranti, puntando all'investimento in misure di integrazione e sviluppo di un forte discorso pubblico sulla diversità e la mobilità come capisaldi della società contemporanea Europea.

Una proposta è stata presentata dall'Alto Commissariato delle Nazioni Unite per i Diritti Umani con lo stabilimento di Principi e Linee Guida per la protezione dei diritti umani dei migranti in situazioni vulnerabili. Nel processo di arrivo in un paese ospitante, i migranti possono essere esclusi dalla categoria giuridica di "rifugiati", in base alla situazione dalla quale provengono, le circostanze del loro viaggio e le condizioni che affrontano al loro arrivo, il loro sesso, età, disabilità e problemi di salute. Tuttavia, dal momento che tutte le persone, inclusi gli stranieri beneficiano di diritti sotto la legge umanitaria internazionale, i rifugiati e i richiedenti asilo beneficiano anch'essi di questi diritti. I principi e le linee guida sono di particolare interesse per questa ricerca dal momento in cui presentano un'evoluzione sul discorso di protezione delle libertà individuali e contro la detenzione arbitraria. L'obiettivo è quello di sviluppare interventi mirati per fermare la detenzione illecita o arbitraria di immigrati e prevenire in ogni caso la detenzione di minori a causa dello stato dei loro genitori. Lo scopo è fornire alternative alla detenzione che rispettino pienamente i diritti dei migranti e siano basati su un'etica di assistenza piuttosto che di attuazione. Inoltre, ogni ordine di restrizione del movimento deve essere considerato legale solo se ha l'obiettivo di mantenere l'ordine pubblico, garantendo al migrante l'accesso tempestivo a rimedi legali, consentendogli di denunciare una violazione dei suoi diritti.

In materia delle condizioni di accoglienza dei migranti, è stata approvata a livello Europeo nell'anno 2013, la Direttiva sulle Condizioni di Accoglienza che garantisce a ogni richiedente asilo in attesa di una decisione sullo stato della sua richiesta, di essere assistito in base alle sue necessità, con l'obiettivo di garantirgli un adeguato standard di vita. Il ruolo degli Stati Membri deve essere certificare entro tre giorni lo stato del richiedente asilo, fornendo un documento volto a specificare se al richiedente è consentita la permanenza nello Stato Membro in questione. Nel contesto della documentazione, lo Stato ricevente deve provvedere all'identificazione di bisogni speciali del richiedente, se esso è una persona vulnerabile, e quindi assicurargli un accesso adeguato a servizi medici e psicologici.

Dello stesso genere, sono le linee guida dell'EASO dell'anno 2016 sulle condizioni di accoglienza. Queste definiscono standard comuni applicabili ai sistemi di accoglienza nazionali e alcuni indicatori che definiscono questi standard. I principali obiettivi delle linee guida sono quelli di servire come mezzo di supporto e sviluppo per gli standard di accoglienza delle autorità supportando, le strutture e lo staff di formazione.

Infine, è importante sottolineare che, nonostante la diminuzione degli arrivi, la questione di come regolamentare i flussi migratori nel contesto europeo rimane una prerogativa nell'agenda dei leader Europei. Dopo il caso Khlaifia, molti progressi sono avvenuti a livello internazionale. Un approccio globale alla migrazione fu proposto e adottato per migliorare le relazioni tra Stati Membri dell'Unione e Stati al di fuori di essa. Inoltre, con la modifica della Convenzione di Dublino, gli Stati di confine come l'Italia e la Grecia furono alleviati dai flussi massivi di immigrazione con un miglioramento nella redistribuzione dei migranti in situazioni di emergenza. Inoltre, la definizione di principi e linee guida da applicare a migranti in situazioni vulnerabili hanno garantito un passo avanti nel miglioramento delle condizioni di vita dei migranti negli Stati Membri in attesa della decisione sul loro stato. Tuttavia, nonostante questi sviluppi dal punto di vista legale, esistono ancora pratiche informali che promuovono la detenzione illecita dei migranti negli hotspots con l'obiettivo di semplificare l'identificazione e il rilevamento delle impronte digitali. Le vittime sono lasciate nella condizione di non essere capaci di appellarsi a un tribunale che decida in tempo breve la legittimità della loro detenzione. La continua violazione dei diritti dell'uomo, anche se formalmente punita a livello internazionale, non è efficace nel punire gli autori di queste violazioni e agire in maniera preventiva per evitare ulteriori sofferenze. Necessario nel contesto presente e futuro è il monitoraggio delle attività degli Stati Membri nel processo di accoglienza e registrazione. Di evidente importanza sarà anche l'intervento repentino della Corte dei Diritti Umani quando si denuncia una violazione della CEDU. I capi di stato europei hanno il dovere di garantire a ogni individuo il rispetto dei suoi diritti fondamentali in un clima di cooperazione tra Stati. L'immigrazione non può essere fermata ma ognuno può beneficiare da essa per un migliore clima internazionale di pace e cooperazione tra Stati.